The Senate Interim Committee on Natural Resources

Interim Report to the 78th Legislature

Texas Compliance with the Federal Clean Air Act and Establishment of the Texas Emission Reduction Plan Advisory Committee

August 2002

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Report to the 78th Legislature
Compliance with FCAA / Establishment of TERP Advisory Committee

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BCCA	Business Coalition for Clean Air
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CTTS	Code Traceable Test Suite
DOE	Department of Energy
EPA	Environmental Protection Agency
ESL	Energy Systems Lab
FCAA	Federal Clear Air Act
GLO	General Land Office
HERS	Home Energy Rating System
HGA	Houston-Galveston Area
IECC	International Energy Conservation Code
IRC	International Residential Code
NOx	Nitrogen Oxide
PUC	Public Utility Commission
SECO	State Energy Conservation Office
SIP	State Implementation Plan
TCAWG	Texas Clean Air Working Group
TERP	Texas Emissions Reduction Plan
TCE	Texas Campaign for the Environment
TCET	Texas Council for Environmental Technology
TNRCC	Texas Natural Resource Conservation Commission
TransStar	TransStar Energy Company
TSIA	Texas State Inspection Association
VOC	Volatile Organic Compounds

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INTRODUCTION

Meeting the federal air quality standards established by the Clean Air Act continues to pose a challenge for the State of Texas. However, during the 77th legislative session, a monumental step toward compliance was taken by the State of Texas with the passage of Senate Bill 5.

This landmark piece of legislation established the Texas Emissions Reduction Plan, an incentive-based program designed to ensure that the air in Texas is safe for its citizens to breathe. Should Texas fail to meet the emissions reductions requirements established by the federal government, the potentially devastating result could be the loss of hundreds of millions of dollars in federal highway funding, major statewide economic impact, and the implementation of a federal clean air plan.

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INTERIM CHARGE

The Senate Interim Committee on Natural Resources was charged by Lieutenant Governor Bill Ratliff with assessing the current efforts to reduce emissions and comply with the federal Clean Air Act. The Committee was also instructed to monitor the efforts of the Texas Emissions Reduction Plan Advisory Committee as established in SB 5, 77th Legislature.

The interim committee held public hearings in Austin, Houston, Dallas, Amarillo and Brownsville to receive testimony from interested parties on the subject. Specific testimony covering the parameters of this charge was received at Austin, Houston and Dallas.

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BACKGROUND

The Federal Clean Air Act (FCAA) directs the U.S. Environmental Protection Agency (EPA) to establish national standards for commonly occurring air pollutants that pose threats to public health. In November 1990, the United States Congress approved the first major changes to the FCAA since 1977. These changes, the 1990 federal Clean Air Act Amendments (1990 CAAA), added provisions that addressed concerns associated with hazardous air pollutants, acid rain, and stratospheric (upper-level) ozone. Additionally, the 1990 CAAA substantially changed the method by which states were to address attainment of the air quality standards for criteria pollutants, especially ground-level ozone.

In September of 1999, former Lieutenant Governor Rick Perry charged the 76th Senate Interim Committee on Natural Resources to study the challenges that the State of Texas faced in meeting federal air quality standards under the Clean Air Act, as well as the impact of federal vehicle, fuel, engine, aircraft and other standards on the state's ability to meet Clean Air Act requirements. The Committee received testimony from interested parties during hearings conducted across the state. The resulting Committee report that was submitted to the 77th Legislature contained findings and recommendations that were shaped into Senate Bill 5, authored by Senator J.E. "Buster" Brown and signed into law by Governor Perry in June of 2001. SB 5 established the Texas Emissions Reduction Plan (TERP), an incentive-based program designed to assure Texas' compliance with the minimum federal standards established by the Clean Air Act.

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Funds for the incentive programs established in SB 5 were to be obtained through a series of statewide fees and surcharges to be collected and distributed by the Texas Comptroller of Public Accounts. Since SB 5 became effective in September of 2001, several lawsuits have been filed to challenge certain provisions of the bill. The lawsuit which has had the most significant impact upon the implementation of the TERP was brought by a group of automobile dealers who challenged the constitutionality of a particular fee included in the funding structure of SB 5 and, ultimately, the fee was found by a Travis County court to be unconstitutional. Judge Livingston of Travis County issued an injunction prohibiting the Comptroller from collecting the $225 inspection fee for out-of-state vehicles which in turn reduced the annual budget for the TERP from approximately $137 million dollars to approximately $30 million. On June 6, 2002, Judge Livingston entered a final judgement ruling the fee unconstitutional. (see Appendix N) The repercussions of this decrease in the TERP budget have significantly hampered the implementation of the TERP on all levels.

CURRENT EFFORTS BY STATE GOVERNMENT TO REDUCE EMISSIONS AND COMPLY WITH THE FEDERAL CLEAN AIR ACT

TNRCC

SB5 directed the TNRCC to delete the requirements for a ban on the morning operation of construction equipment and for the early purchase of Tier 2 and Tier 3 equipment from the state implementation plan (SIP) and to add the provisions of SB5. The construction shift and the accelerated purchase of Tier 2 and 3 equipment were expected to result in nitrogen oxide (NOx) emissions reductions of 35.2 tons per day by 2007. In September 2001, the TNRCC adopted and submitted to EPA several revisions to the SIP including repeal of the construction shift and accelerated purchase Tier 2 and Tier 3 equipment.

GOALS / TIMELINE

TERP

August 2001	-Rules for emission reduction incentive grants completed
October 2001	-Guidance for emission reduction incentive grants adopted, first RFP issued
November 2001	-First RFP closed, about $10 million requested
February 2002	-Eight first round projects selected for about $3 million, second round RFP opened
June 2002	-Second round project selections
July/August 2002	-FY 2003 first round RFP expected to be issued

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Due to funding constraints, the TNRCC has limited the applications for the first two rounds of grant funding to the Houston/Galveston and Dallas/Fort Worth areas, rather than all affected counties listed in SB 5.

Heavy-Duty Motor Vehicle Purchase or Lease Incentive Program

August 2001	-Rules completed
October 2001	-Guidance adopted
August 2002	-Program can not begin until this date

Light-Duty Motor Vehicle Purchase or Lease Incentive Program

August 2001	-Rules completed
October 2001	-Guidelines for Vehicle Manufacturer Requirements adopted
December 2001	-Clean Car Insignia contest started
March 2002	-Clean Car sticker design made available on the web
July 2002	-Manufacturers' brochure due
August 2002	-Program can not begin until this date

TERP Advisory Board

May 2002	-Appointments finalized
June 2002	-First meeting

TERP Biennial Report to the Legislature

June 2002	-First draft of the biennial report available for internal review
August 2002	-Public meeting(s) held for consideration of biennial report
November 2002	-Biennial report finalized and printed

CHALLENGES / SUCCESSES

The primary objective in addressing the challenges (financial and otherwise) of the TERP program should be to provide the state with ability to realize sufficient emission reductions for the approval of the Dallas/Fort Worth SIP and the continued approval of the Houston/Galveston SIP. A second objective would be to provide grant funding for projects in the other "affected" areas of the state (as defined by SB 5).

TNRCC successes under the TERP:

--Created an infrastructure for an emissions reduction incentive grants program

--Provides an opportunity for coordinated efforts between agencies responsible for developing programs addressing emission reduction activities

--Developed material to educate the general public and the regulated community on the issue of clean vehicles, potentials for emission reductions and activities required to comply with the federal clean air standard

--Facilitates the development of technologies to address air emission issues as they relate to cleaner fuels, cleaner vehicles, cleaner construction equipment, etc.

Additional challenge (other than lack of funding):

--Difficulty in securing response from some sectors to participate in grants program; however, education and out-reach efforts have helped to increase participation from many of the necessary sectors.

COMMENTS / CONCERNS FROM PUBLIC AND INDUSTRY

-- Some concern expressed about the complexity of the program.

-- Comments and concerns regarding the 30% percentage reduction requirements, and how this limits the available options, even if reductions can otherwise be achieved under the cost effectiveness requirements.

TNRCC RULEMAKING - SUMMARY

TNRCC Adopted Grant Rules (see Appendix A)

In August 2001, the Texas Natural Resource Conservation Commission adopted rules to implement grant provisions included in Senate Bill 5,the Texas Emission Reduction Plan, adopted by the 77th Texas Legislature in 2001. Senate Bill 5 required the TNRCC to delete the operating restriction on construction equipment rules and the Tier 2/Tier 3 accelerated purchase rules on construction equipment from the Dallas/Fort Worth and Houston/Galveston (HGA) state implementation plans (SIP) and replace them with programs from SB 5. The SB 5 programs are estimated to achieve emissions reductions in excess of the reductions expected from the rules that are being repealed. In accordance with SB 5, the SIP will be revised to replace these rules with the TERP.

These rules will establish an incentive program for the repower, retrofit or add-on, use of a qualifying fuel, and the development and demonstration of new technologies in engines used in on-road and non-road diesel equipment that will reduce nitrogen oxides (NO_x) emissions not otherwise required by federal requirements. These rules also establish incentives for the purchase or lease of new non-road equipment and

for the implementation of infrastructure projects. The implementation and administration of the incentive programs will be performed by the TNRCC and implemented through establishment of guidelines and criteria for eligible projects. The incentive programs established by these rules are available for use in the nonattainment areas of Texas and other affected areas of the state.

SECTION BY SECTION DISCUSSION

The new Subchapter K includes a new Division 3 which will establish a new Diesel Emissions Reduction Incentive Program for On-Road and Non-Road Vehicles with rules found in the new §§114.620 - 114.622, 114.626, and 114.629. Except where noted in the discussion that follows, the requirements in the new rules are taken from requirements in SB 5. Also, criteria and requirements will be further refined through the guidelines and criteria that will be developed as part of the incentive program, as provided for in SB 5.

The new §114.620 contains definitions applicable to the diesel emission reduction incentive program for on-road and non-road vehicles. These definitions include: cost-effectiveness, incremental cost, motor vehicle, non-road diesel, non-road engine, on-road diesel, qualifying fuel, repower, and retrofit. Administrative changes were made to indent the first paragraph and to capitalize the first word of the definitions in (3) - (5) and (7) - (9) to conform to *Texas Register* format and style.

The new §114.621 establishes the applicability of persons applying for grants from the diesel emission reduction incentive program for on-road and non-road vehicles. This provision will allow for potential future, as well as current, owners and operators to be eligible for grants from the program.

The new §114.622 establishes the eligibility requirements for the incentive program while the new §114.622(a) lists projects that are eligible for funding which include the following: purchase or lease of non-road diesels; emissions-reducing retrofit projects for on-road or non-road diesels; emissions-reducing repower projects for on-road or non-road diesels; purchase and use of emissions-reducing add-on equipment for on-road or non-road diesels; development and demonstration of practical, low-emissions retrofit technologies, repower options, and advanced technologies for on-road or non-road diesels with lower NO_x emissions; use of qualifying fuels; implementation of infrastructure projects; and other projects with the potential to reduce NO_x emissions from diesel engines.

The new §114.622(b) requires that, if a project is funded under this incentive program, at least 75% of the vehicle miles traveled or the hours of operation must take place in a nonattainment or affected county for five years following the grant. It is important that reductions be achieved for purposes of demonstrating attainment by 2007, and the agency will develop guidance accordingly. Furthermore, the new §114.622(c) requires that: old equipment or engines that are replaced must be recycled, scrapped, or otherwise removed from all affected counties.

New §114.622(d) states that grants can only be awarded to projects that have a cost-effectiveness not exceeding $13,000 per ton of NO_x emissions reduced. The phrase “subsection (a)(1) - (7) at this section” was changed to “subsection (a) of this section,” to include all eight eligible projects. New §114.622(e) specifies that projects funded with this grant money cannot be used to generate emission credits. This is due to the fact that grants under this program are to be awarded to projects that will serve to replace the emissions reductions in the SIP that were expected to

be generated by the repealed construction shift and accelerated purchase of Tier 2 and Tier 3 equipment. For this reason, these reductions cannot also be used for emissions credit under any state or federal emissions reduction credit averaging, banking, or trading program.

New §114.622(f) specifies that projects are not eligible if required by a state or federal law, rule or regulation, memorandum of agreement, or other legally binding document. New §114.622(g) states that a retrofit, repower, or add-on equipment project must achieve a reduction of at least 30%.

Finally, new §114.622(h) states that if a grant recipient fails to meet the terms of a project grant or the conditions of this division, the grant recipient may be required to return some or all of the funding. All of these requirements are found in SB 5 except the requirement that old equipment or engines must be recycled, scrapped, or removed from the affected counties. The commission included this requirement so that these older equipment and engines are truly replaced with newer ones in order to ensure that all of the estimated emission reductions are actually achieved.

The new §114.626 establishes that grant recipients must meet the reporting requirements of the grant and that reports will not be required more than once in a 12-month period. General reporting requirements may be detailed in guidance that is being developed for this incentive program in addition to project-specific reporting requirements which may be included in the grant terms.

The new §114.629 lists the affected counties in which this program applies. The new §114.629 also establishes that equipment purchased before September 1, 2001

are not eligible for funding. This list of counties includes the nonattainment area counties of Texas as well as other counties which could potentially become nonattainment counties in the near future.

PUBLIC HEARINGS AND COMMENTATORS

The commission held public hearings on this proposal on August 13, 2001 in Houston; on August 14, 2001 in Austin and in Arlington. The comment period closed on August 14, 2001. Comments were received from the Association of Automotive Service Providers (AASP); Behthul & Kean, LLP on behalf of Associated Builders and Contractors of Greater Houston (Associated-Houston); Business Coalition for Clean Air (BCCA); City of Fort Worth (Fort Worth); City of Houston (Houston); Galveston-Houston Association for Smog Prevention (GHASP); Good Company (Good); Houston Sierra Club (Sierra-Houston); Hughes and Luce, LLP, on behalf of the Alliance of Automobile Manufacturers (AAM); JMS Ventures (JMS); Metron Management (Metron); Metropolitan Transit Authority (Metro-Houston); Port of Houston (POH); Power Systems Associates on behalf of Darr Equipment Company, Holt Power Systems, and Mustang Power Systems (PSA); Public Citizen - Texas Office on behalf of the Texas Campaign for the Environment, SEED Coalition, Clean Water Action, Environmental Defense, and Sierra Club, Texas/Arkansas Field Office (Public Citizen); Sierra Club Texas/Arkansas Field Office (Sierra-TX/AR); Sneed Institute (Sneed); Texas Campaign for the Environment (TCE); TXU Business Services (TXU); Texas Clean Air Working Group (TCAWG); Texas Department of Transportation (TxDOT); Texas State Inspection Association (TSIA); TranStar Energy Company (TranStar); United States Environmental Protection Agency (EPA); and seven individuals.

TNRCC Adopted Rebate Rules (see Appendix B)

In August 2001, the Texas Natural Resource Conservation Commission adopted rules to implement rebate provisions included in Senate Bill 5 (the Texas Emission Reduction Plan), adopted by the 77th Texas Legislature in 2001.

The adopted rules will establish a state-wide incentive program for the purchase or lease of new on-road diesel vehicles and light-duty motor vehicles that meet emission standards more stringent than those required by federal requirements. The incentive for eligible on-road diesel vehicles will be the reimbursement of incremental costs to purchase the cleaner vehicle, and the incentive for eligible light-duty motor vehicles will be an award of a specified dollar amount. Both incentives will be based on the emission standard to which the vehicle is certified. The implementation and administration of the new on-road diesel vehicle purchase or lease incentive program will be performed by the commission. However, implementation and administration of the incentive awards associated with the light-duty motor vehicle purchase or lease incentive program will be the responsibility of the state comptroller's office.

SECTION BY SECTION DISCUSSION

The new Subchapter K includes two new divisions which will establish the rules concerning motor vehicle purchasing and leasing incentives. The new Division 1 includes the new on-road diesel vehicle purchase or lease incentive program rules found in new §§114.600 - 114.602, and 114.609. The new Division 2 includes the new light-duty motor vehicle purchase or lease incentive program rules found in new §§114.610 - 114.612, 114.616, 114.618, and 114.619.

The new §114.600 contains definitions applicable to the on-road diesel vehicle purchase or lease incentive program rules. These definitions include: incremental costs, lease, lessee, motor vehicle, new on-road diesel vehicle, and on-road diesel. The definitions of motor vehicle and on-road diesel are as specified under SB 5, §1. The other definitions listed were added for clarity.

The new §114.601 establishes the state-wide applicability of §§114.600, 114.602, and 114.609. All incentives are subject to the availability of funding for this program. Because the funding for these incentives is from surcharges which will be collected throughout the lifetime of the program, and because there are statutory caps on the amount of funding for this program, funding for incentives for eligible vehicles may be delayed or unavailable. Incentives will be funded in the order of the submission of a completed certification. In addition, in response to public comment, the proposed §114.601 has been amended to include a new subsection (b) which prohibits eligibility if the purchase or lease of the new on-road diesel motor vehicle is required by any other federal, state, or local regulations or agreements.

The new §114.602 establishes the eligibility requirements for the on-road diesel vehicle purchase or lease incentive to reimburse the incremental costs of purchasing or leasing an on-road diesel vehicle that is certified by the United States Environmental Protection Agency (EPA) to meet an emission standard more stringent than that of a conventional on-road diesel vehicle. The new §114.602 also specifies that only one incentive will be provided for each eligible new on-road diesel vehicle purchased or leased in the state and that the incentive shall be provided to the lessee and not to the purchaser if the on-road diesel vehicle is purchased for the purpose of leasing the on-road diesel vehicle to another person. In addition, new

§114.602 specifies that the incentive for the lease of an eligible new on-road diesel vehicle must be prorated based on an eight-year lease term. This provision will likely prevent the excessive use of short term leases in acquiring incentive funding.

The new §114.609 establishes the schedule of emission standards and incentive amounts from which the incremental cost reimbursement incentives will be based. In response to comment and to reflect the requirements of the statute, new §114.609(b) establishes the ability of the commission, in consultation with the TERP Advisory Board (Advisory Board), to evaluate new technologies and to change, if necessary, the incentive emissions standards established under this section, to improve the ability of the program to achieve its goals.

The new §114.610 contains definitions applicable to the light-duty motor vehicle purchase or lease incentive program rules. These definitions include: bin or emissions bin, lease, lessee, light-duty motor vehicle, and new light-duty motor vehicle. The definitions of bin or emissions bin, light-duty motor vehicle, and motor vehicle are as specified under SB 5, §1. The other definitions listed were added for clarity.

The new §114.611 establishes the state-wide applicability of §§114.610, 114.612, 114.616, 114.618, and 114.619. All incentives are subject to the availability of funding for this program. Because the funding for these incentives is from surcharges which will be collected during the pendency of the program, and because there are statutory caps on the amount of funding for this program, funding for incentives for eligible vehicles may be delayed or unavailable. Incentives established by these rules will be funded in accordance with rules and procedures

adopted by the state comptroller's office. In addition, in response to public comment, §114.611 has been amended to include a new subsection (b) which prohibits eligibility if the purchase or lease of the new light-duty motor vehicle is required by any other federal, state, or local regulations or agreements.

The new §114.612 establishes the eligibility requirements for the new light-duty purchase or lease incentive for the purchase or lease of a new light-duty motor vehicle that is certified by the EPA to meet the Tier 2 - Bin 4, Bin 3, Bin 2, or Bin 1 emission standards or to an emissions standard that is at least as stringent. The new §114.612 also specifies that only one incentive will be provided for each eligible new light-duty motor vehicle purchased or leased in the state and that the incentive shall be provided to the lessee and not to the purchaser if the new light-duty motor vehicle is purchased for the purpose of leasing the light-duty motor vehicle to another person. In addition, new §114.612 specifies that the incentive for the lease of an eligible new light-duty motor vehicle must be prorated based on a four-year lease term. This provision will likely prevent the excessive use of short-term leases in acquiring incentive funding.

The new §114.616 establishes the requirements for a list of eligible vehicles that vehicle manufacturers will be required to provide to the executive director, or his designee, at the beginning, but no later than July 1, of each year preceding the next new vehicle model year, beginning January 1, 2002. The information to be included on this list will provide the commission with sufficient data to verify the emission certification of vehicles listed. The new §114.616 will also allow the manufacturer to supplement the list as necessary to include additional new light-duty motor vehicle models that the manufacturer intends to sell in this state during the model year. In

addition, new §114.616 will require that all dealers and leasing agents of new light-duty motor vehicles statewide make copies of this list available to their prospective purchasers or lessees. This provision will help provide awareness of this incentive program to dealers statewide and provide additional information to customers in making purchase selection decisions.

The new §114.618 establishes the requirements for a vehicle emissions brochure that vehicle manufacturers will be required to publish by September 1 of each year and distribute to customers regarding the vehicles eligible to receive an incentive, beginning September 1, 2002. The dimensions of the brochure are also established by the new §114.618 for the sake of uniformity in printing styles and so that the brochure may be easily recognized by prospective purchasers and lessees. The new §114.618 will also require each manufacturer to submit a copy of the brochure to the executive director, or his designee, by September 1 of each year, beginning September 1, 2002. In addition, new §114.618 will require manufacturers that do not intend to sell new light-duty motor vehicles in the state that may be eligible for the incentive to publish a brochure that states a notice of that fact. Finally, new §114.618(a)(5) has been added to require that the brochure include, at a minimum, not only the commission's website, but also information that a complete list of all eligible motor vehicles that manufacturers intend to sell in this state is available at this website.

The new §114.619 establishes the schedule of emission standards and corresponding incentive amounts from which the incentives will be based.

PUBLIC HEARINGS AND COMMENTATORS

The commission held public hearings on this proposal on August 13, 2001 in Houston; on August 14, 2001 in Austin and in Arlington. The comment period closed on August 14, 2001. The following commentators provided oral testimony and/or submitted written testimony: Hughes and Luce, LLP, on behalf of the Alliance of Automotive Manufacturers (AAM); Association of Automotive Service Providers (AASP); Business Coalition for Clean Air (BCAA); City of Houston (Houston); Public Citizen's Texas Office on behalf of the Texas Campaign for the Environment, SEED Coalition, Clean Water Action, Environmental Defense, and Sierra Club - Texas/Arkansas Field Office (Public Citizen); Sierra Club - Texas/Arkansas Field Office (Sierra-TX/AR); Sierra Club Houston Regional Group (Sierra-Houston); Texas Campaign for the Environment (TCE); Texas Clean Air Working Group (TCAWG); Texas State Inspection Association (TSIA); TranStar Energy Company (TranStar); EPA; and four individuals.

OFFICE OF THE COMPTROLLER

Duties as established in SB 5:

Sec. 386.053. Guidelines and Criteria

(e)The current state of air quality does not meet the federal air quality requirements. Therefore, the commission and comptroller may put emergency rules into practice.

Sec. 386.156. List of Eligible Motor Vehicles

Each year the commission will provide the comptroller with a list of appropriate motor vehicles. The comptroller will distribute this list to new motor vehicle dealers and leasing agents in Texas.

Sec. 386.158. Light-Duty Motor Vehicle Purchase or Lease Incentive

Owners of light-motor vehicles are eligible for incentive only by law or rule of the comptroller.

Sec. 386.160. Comptroller to Account for Motor Vehicle Purchase or Lease Incentives

The comptroller is responsible for administering and accounting for the purchase or lease incentives and also responsible for evaluating applications for incentives and paying appropriate individuals. In addition, he/she will develop and distribute forms for incentive programs. These forms will be made available to dealers and leasing agents, where they will in turn provide them for prospective buyers.

The comptroller must also publish a verification form from which the sale of a vehicle may be verified. This form must be filled out and included with the application for incentive, and remain on record for 2 years from the date of transaction.

Sec. 386.161. Report to Commission; Suspension of Purchase or Lease Incentives

The comptroller will report to the TNRCC on an annual basis regarding motor vehicle purchase or lease incentives. If the available balance for vehicle purchase or lease incentives falls below 15 percent of the total allocated for the incentives during that fiscal year, the comptroller by order shall suspend the incentives until the

date the comptroller can certify that the balance available in the fund for incentives is an amount adequate to resume the incentives or the beginning of the next fiscal year, whichever is earlier.

A toll-free telephone number shall be established by the comptroller and made available to motor vehicle dealers and leasing agents so that they may call to verify that incentives are available. The comptroller may provide for issuing verification numbers over the telephone line.

The reliance by a dealer or leasing agent on information provided by the comptroller or commission is a complete defense to an action involving or based on eligibility of a vehicle for an incentive or availability of vehicles eligible for an incentive.

Subchapter F. Texas Emissions Reduction Plan Fund
Sec. 386.251. Fund

(a) The Texas emissions reduction plan fund is in the state treasury's account.

(b) The fund is overseen by the comptroller and is exempt from the rules stated in Section 403.095 of the Government Code. Any interest earned by the fund will also be given back to the fund.

Sec. 151.0515. Texas Emissions Reduction Plan (TERP) Surcharge

(c) The extra fee will be collected at the same time and in the same way, and will be overseen and enforced in the same way as the tax that is established in this chapter. The comptroller will make any additional rules that are needed for collecting, administering, and enforcing the extra fee. The comptroller will also deposit all the money collected by this plan to the TERP fund.

Sec. 152.0215. Texas Emissions Reduction Plan Surcharge

(b) The extra fee will be collected at the same time and in the same way, and will be overseen and enforced in the same way as the tax that is established in this chapter. The comptroller, by law, will make any additional rules that are needed for collecting, administering, and enforcing the extra fee. The comptroller will also deposit all the money collected by this plan to the TERP fund.

Sec. 502.1675 Texas Emissions Reduction Plan Surcharge

(b) The person who collects and assess county taxes will give the money

collected under this plan to the comptroller when and in the way in which the comptroller states so that this money will be added to the TERP fund.

SECTION 9. Section 548.256 of the Transportation Code is changed by adding Subsections (c) and (d) to read:

(c) The inspection station will collect $225 for each inspection and will give that money to the department. Of each individual fee collected, the inspection station can keep $5 to cover their costs. The department will give the remaining fees to the comptroller for the TERP fund. The fee outlined in this subsection does not apply to inspections of vehicles owned by active military personnel and their families. This section will expire on August 31, 2008.

Sec. 548.5055 Texas Emission Reduction Plan Fee

(b) The department shall give the money collected under this section to the comptroller when and in the manner that the comptroller states for the TERP fund.

SECTION 11.

(b) Within 45 days of the effective date of this act, the comptroller will make the necessary changes to carry out these charges.

SECTION 12.

(c) Before August 1, 2002, The Texas Natural Resource Conservation Commission (TNRCC) and the comptroller will make the necessary rules to carry out the motor vehicle purchase or lease incentive program.

Duties shared with PUC & TNRCC:

Sec. 386.051 Texas Emission Reduction Plan (TERP)

(a) TERP will be overseen by the PUC, the commission, the comptroller, and the council.

Duties shared with TNRCC & TCET:

Sec. 386.051 Texas Emissions Reduction Plan

(b) The commission, the comptroller, and the council will provide grants and funds for:

(1) The diesel emissions reduction incentive program
(2) The motor vehicle purchase of lease incentive program
(3) The new technology research and development program

Duties shared with TNRCC:

Sec. 386.152 Comptroller and Commission Duties Regarding Light-Duty Motor Vehicle Purchase or Lease Incentive Program

(a) The comptroller and the commission will develop a buy or lease incentive program for new light-duty motor vehicles and will follow the necessary rules to put the program into practice.

Sec. 386.159 Public Information

(a) The commission, with the help of the comptroller, will establish a program to inform the public as well as sellers of new motor vehicles and leasing agents about the incentive program described above.

Section 12

(a) If this Act is not in effect by August 1, 2001, the Texas Natural Resource Conservation Commission and the comptroller of public accounts will follow the necessary rules in order to apply the diesel emission reduction incentive program as stated in Subchapter C, Chapter 386, of the Health and Safety Code.

COMPTROLLER - STATE ENERGY CONSERVATION OFFICE (SECO)

Duties as established in SB 5:

Sec. 388.005 Energy Efficiency Programs in Certain Political Subdivisions

(e) This section sets out annual reporting requirements due to SECO using forms provided by SECO. SECO may provide technical assistance to help areas meet their goals.

Sec. 388.006 State Energy Conservation Office Evaluation

Each year, SECO will evaluate how well different areas' energy efficiency programs work and will give this evaluation to the commission.

SECO has created a partnership with the U.S. Department of Energy's Rebuild America Program to provide information and technical assistance to political

subdivisions in the "affected counties." Recognizing the logistical challenge of direct support for the estimated 4000 individual political subdivisions, the partnership is working with a number of communities designated as "early adopters." Efforts in these communities will be strengthened so they can better serve as models regionally and throughout the state.

Reporting forms have been developed and posted on the SECO website: http://www.seco.cpa.state.tx.us/sb5compliance.htm.

Letters are scheduled to be mailed in June 2002 to city managers, mayors and administrators; county judges; and county tax assessors that will include copies of the forms, reporting instructions, and a list of frequently-asked questions.

Additionally, SECO has sponsored, conducted, or been involved in approximately 35 workshops dealing with SB 5 implementation issues, including the new Energy Code.

FUNDING STATUS

There is no provision in SB 5 that appropriates funding for SECO's implementation activities. SECO has absorbed expenditures for all activities to date, including travel, staff time, workshops and related expenses.

GOALS / TIMELINE

July 1, 2002	-Collect baseline energy consumption data from reporting entities.
September 1, 2002	-Create and distribute an educational CD that will contain a wide range of documents including information on energy management and planning, building audits, benchmarking, commissioning, maintenance and operation procedures, purchasing and financing opportunities, energy efficiency technologies and a listing of state, national and industry resources. -Assist all "early adopters" in creating action plans to implement identified goals and objectives.
December 1, 2002	-Develop and coordinate the operation of a web-based site for data collection.
March 1, 2003	-Collect electricity consumption data from entities for 2002 and report to TNRCC on effectiveness.
Ongoing	-Provide planning and technical support to political subdivisions with focused interest on "early adopters." -Promote and assist in the planning and deployment of local workshops and seminars on energy efficiency and renewable energy topics.

CHALLENGES / SUCCESSES

TERP has energized the development of coalitions in local regions to address energy efficiency. Cities like San Antonio, Houston, Galveston and Waxahacie are developing implementation strategies which will serve as models for other communities.

COMMENTS / CONCERNS FROM PUBLIC AND INDUSTRY

COMMENTS

-- Definition of "facility" – Are street lights a facility?

-- Need for more information on building and lighting technologies, financing options, and employee outreach.

CONCERNS

-- Confusion over compliance dates.

-- "SB 5 is providing us the focal point to act."

-- "Cities have not regarded energy costs as a major issue until recently; it is a major concern and 'we plan to move forward.'"

COMPTROLLER - TAX ADMINISTRATION DIVISION

County tax offices and entities that sell heavy-duty diesel construction equipment have been collecting and remitting these surcharges on sales of certain equipment

since September 1, 2001. The Comptroller's Tax Administration Division (tax division) has adopted administrative rules, which provide guidelines for taxpayers, and has successfully designed and implemented these systems, including the necessary forms, publications, and computer systems.

Additionally, the tax division is preparing to implement the Clean Vehicle Incentive Program on August 1, 2002. This program will include:

-Literature that explains the program and that dealers may give to customers interested in the program

-A toll-free automated phone number that purchasers or dealers can use to verify that incentives are available.

-A toll-free number to call for answers to questions concerning the program.

-A web page that explains the program and can be used to verify that incentives are available.

-A form that purchaser or lessee can use to request an incentive.

-An administrative rule that will set out the guidelines for the program.

FUNDING STATUS

The total amount of the revenue collected through May 29, 2002 was $14,013,527.12. Of the total amount collected, $11.4 million has been paid out as of April 2002.

The following amounts have been paid to state agencies from the TERP fund:

TNRCC	$125,022.77
Texas Engineering Experiment Station	$102,219.00
PUC	$ 1,144.56
Comptroller's credit interest	$ 194.74
Total as of May 29, 2002	$228,581.07

Of the $11.4 million from TERP fund that has cleared as of April 2002, $1.8 million has been allocated based on percentage as provided by SB5 to the Clean Vehicle Incentive Program. However, $970,000 of $1.8 million is seed money that must be returned to the General Revenue Fund.

GOALS / TIMELINE

In July, the Tax Division will mail brochures explaining the Clean Vehicle Incentive program to motor vehicle dealers. Their administrative rule will be submitted to the Secretary of State by July 1, 2002. The program, including the website and toll-free number, will be in place by August 1, 2002.

CHALLENGES / SUCCESSES

County tax offices and the entities that sell construction equipment have been very cooperative in collecting and remitting the new surcharges.

A question exists as to whether the incentive payments can be made if there are

insufficient funds.

COMPTROLLER RULEMAKING - SUMMARY

State Sales Tax Rule 3.320 - (see Appendix C)

Texas Emissions Reduction Plan Surcharge; Off-Road, Heavy-Duty Diesel Construction Equipment - sets out guidelines for the collection and remittance of a 1 percent surcharge on off-road, heavy-duty diesel construction equipment sold, leased, or rented on or after September 1, 2001.

Motor Vehicle Sales Tax Rule 3.96 - (See Appendix D)

Imposition and Collection of a Surcharge on Certain Diesel Powered Motor Vehicles - provides guidelines for the payment of a 2.5 percent surcharge imposed on purchases of older, diesel-powered vehicles that are registered with a gross vehicle weight in excess of 14,000 pounds.

PUBLIC UTILITIES COMMISSION (PUC)

Duties as established in SB 5:

Sec. 386.051 Texas Emissions Reduction Plan

(c) PUC will make grants and funds available for the energy efficiency grant program.

Sec. 386.202 Grant Program

(a) The PUC will develop an energy efficiency program using program models that are in accordance with the rules of the utility commission.

Sec. 386.203 Administration of Grants

Electric utilities, electric cooperatives, and city owned utilities will handle the money budgeted by the PUC for this grant program. The electric utility company, the electric cooperatives, and the city owned utility facilities will be reimbursed from the fund for the money they spend in supervising the energy efficiency grant program. Costs that are reimbursable by a participant cannot be over 10% of that participant's total program budget before January 1, 2003, and over 5% of the total program budget on or after January 1, 2003.

Sec. 386.204 Limitation on Duty of Participating Utility

(a) This section forces an electric utility, an electric cooperative, or a city owned utility only to designate the funds given to that agency.

Section 11

(c) Within 45 days of the effective date, PUC must fully apply these rules.

Duties shared with ESL:

Sec. 386.205 Evaluation of State Energy Efficiency Programs

Working with the laboratory, the PUC will give a yearly report to the commission that measures the changes in the decrease of energy demand, the peak loads, and the emissions from air contaminants that result from these programs by each individual county.

Duties shared with TNRCC and Comptroller:

Sec. 386.051 Texas Emission Reduction Plan (TERP)

(a) TERP will be overseen by the PUC, the commission, the comptroller, and the council.

The Public Utility Commission's (PUC) TERP implementation activities include the promulgation of substantive rules and the development and implementation of an Energy Efficiency Grant Program. In addition, the PUC has worked with the TNRCC and the EPA to develop a model to quantify the air emission reductions resulting from the Energy Efficiency Grant Program and the energy efficiency programs mandated by PURA §39.905. In May, 2002, the PUC awarded two grants for programs under SB 5. The projects selected include a $200,000 proposal for a load-management program from Reliant in the Houston-Galveston non-attainment area, and a $67,950 proposal for a commercial lighting program from Entergy in the Beaumont-Port Arthur non-attainment area.

The proposed emissions reductions attributable to the projects funded include a 150 kW and 1,300,000 annual kWh reduction for Entergy, and a 2.12 MW peak load reduction for Reliant.

Senate Interim Committee on Natural Resources
Report to the 78th Legislature
Compliance with FCAA / Establishment of TERP Advisory Committee

A schedule of PUC activities follows noting key dates and activities:

DATE	ACTIVITY
October 2001	PUC adopts SUBST. R. §§25.182 to implement SB 5.
December 2001	Senate Natural Resource Committee Hearing - Progress update and coordination of roles for all State Agencies responsible for implementation of SB 5
January 2002	PUC develops draft grant application and guidelines standards for evaluating, rating and awarding grants
January 9, 2002	Comptroller of Public Accounts revises 2002 revenue projections from $11 million to $2,193,060
February 2002	Based on actual revenue receipts, the Commission estimates $400,000 available for grant award in April 2002
March 2002	PUC final approval of grant application and guidelines
March 19, 2002	PUC SB 5 Workshop – Request for Proposals. Announce total of $400,000 in available funding for the 2002 grant cycle
March 26 - April 8, 2002	PUC applications accepted
May 31, 2002	Two grants awarded

FUNDING STATUS

DATE	REVENUE	EXPENDITURES AND COMMITMENTS
Total revenue available to date (June)	$888,509	$215,000 administration* $267,950 grant commitments: $200,000 load management program (Reliant) $67,950 commercial lighting program (Entergy)
Projected revenues through August, 2002 (estimate)	$450,000	
Total	$1,338,509	

***Administrative expenses** –The PUC received total estimated appropriations for fiscal year 2002 of $11.4 million for TERP implementation. Following revised revenue estimates for TERP funding, the PUC reduced its total budget to $2.2 million for FY 2002. Due to the late start of the program, the PUC estimates that actual revenues will be approximately $1.4 million. The PUC received appropriations authority for agency administrative expenses for the year; however, the agency reduced its administrative budget to $215,000 following the reduction in the total TERP budget. The amount reserved for administration, approximately ten percent of the total budget, is based on the estimated cost of preparing a report quantifying the air emission reductions resulting from the Energy Efficiency Grant Program and the energy efficiency programs mandated by PURA.

GOALS / TIMELINE

DATE	ACTIVITY
May 2002 – September 2002	Grantees implement programs and report results Commission monitors, evaluates and revises program based on result of pilot program
July 2002	PUC Draft SB 5 report due to TNRCC
October 2002	Coordinate with TNRCC on final report to Legislature
Ongoing, as needed.	Outreach to eligible entities.
January 2003	Request for Proposals – 2nd Grant Cycle

The estimation of air emissions reductions resulting from energy-efficiency programs is a complex analytical problem. The PUC has developed a proposal with TNRCC and EPA. The proposed model employs a model for the consumption of electricity that is a simplification of the complex ERCOT electric system. Using this model, reductions in power-plant production, air emissions and ozone production in the non-attainment areas are estimated. It is likely that public comment on the model and extension of the model to non-ERCOT areas will result in a need for additional modeling of the impact of energy-efficiency on air emissions.

PUC RULEMAKING - SUMMARY

PUC Adopted Rules (see Appendix E)

The Public Utility Commission has adopted **Substantive Rule §§25.182** to govern implementation of the energy efficiency grant program, and **Substantive Rule**

§§25.183 for reporting the results of energy efficiency programs financed with TERP funds.

Rule §§25.182 - describes electric utilities, electric cooperatives and municipally owned utilities as eligible to apply for grant funds to administer the implementation of energy efficiency programs in non-attainment and near non-attainment counties.

Rule §§25.183 - describes the reporting requirements for coordinating the data necessary to enable the Public Utility Commission, in cooperation with Texas A&M Energy Systems Laboratory, to quantify air emissions reduction resulting from funded energy efficiency programs.

These rules fulfill the requirements of Health and Safety Code, Title 5, Subtitle C, Chapter 386, Subchapter E, Energy Efficiency Grant Program, §§386.201-386.205, and provide guidance for the implementation of an energy efficiency grant program and reporting requirements including energy demand and peak load reductions and associated emissions reductions from the programs.

ENERGY SYSTEMS LABORATORY (ESL)

Duties as established in SB 5:

Sec. 388.003 Adoption of Building Energy Efficiency Performance Standards

(e) In nonattainment areas and in affected counties, local changes must result in energy efficiency requirements that are equal to or stricter than energy efficiency requirements in the International Residential Code or International Energy Conservation Code states. Local changes must be in line with the National Appliance Energy Conservation Act of 1987. The laboratory, when asked by a municipality or county, will compare the relative effect of the changes proposed to the energy code, including whether the changes are equal to or more lenient than the unchanged code. In order to establish uniform rules in a region, the laboratory can suggest a climatically appropriate modification or a climate zone designation for a county or a group of counties that is different from the climate zone designation in the unchanged zone. The laboratory will:

(1) Report the results, including an estimate of any potential energy savings, to the council, county, or municipality.

(2) Each year, give a report to the commission that will:

(a) Identify the municipalities and counties whose energy codes are equally as strict as or stricter than the unchanged code

(b) Measure energy savings from this program

(f) Each municipality and county that meet certain requirements must review and consider revisions to the International Energy Conservation Code and the International Residential Code.

(g) The laboratory is authorized to set and collect fees as needed to perform

these requirements.

Sec. 388.004. Enforcement of Energy Standards Outside of Municipality.

This section outlines compliance procedures for construction outside of city jurisdiction.

Sec. 388.007 Distribution of Information and Technical Assistance

(a) Requires lab to provide builders, designers, engineers, and architects, with code implementation materials.

(b) Materials may include software and for projects not involving a design professional, simplified description of requirements.

(c) The laboratory can help local jurisdictions with technical assistance concerning the implementation and the enforcement of the International Energy Conservation Code and the energy efficiency chapter of the International Residential Code.

Sec. 388.008 Development of Home Energy Ratings

(a) This section sets out the procedure for reporting home energy ratings for potential buyers. The reports will include information regarding:

(1) Insulation

(2) Type of windows

(3) Heating and cooling equipment

(4) Water heating equipment

(5) Additional energy conserving features

(6) The results of a test on building tightness and forced air distribution

(7) Overall rating of energy efficiency

(b) It also outlines the establishment of home energy ratings public information program for homeowners, sellers, and buyers

(c) Home energy rating programs must be implemented by September 1, 2002.

Duties shared with PUC:

Sec. 386.205 Evaluation of State Energy Efficiency Programs

Working with the laboratory, the PUC will give a yearly report to the commission that measures the changes in the decrease of energy demand, the peak loads, and the emissions from air contaminants that result from these programs by each individual county.

The Energy Systems Laboratory at Texas A&M University is heavily involved with the energy efficiency elements of SB 5. The ESL engaged in the following SB 5 activities:

--Skeleton plan in review with TNRCC / TCET / PUC to report energy reductions and link to emissions reductions

--Supported builders, code officials, municipalities with the following:

- Created a SB5 Stakeholders Group including Builder Groups, Manufacturers, Public Interest groups, Utilities, and Federal / State / Local agencies.
- Released a simplified Builders Guide to assist in International Residential Code (IRC) / International Energy Conservation Code (IECC) code compliance.
- Conducted 29 training sessions on IRC / IECC code implementation throughout Texas.

- Released an IRC / IECC Self-Certification Form for non-municipality areas.
- Created a Web site for information dissemination, at //eslsb5.tamu.edu.
- Provided technical support for the resolution of the flexible duct issue, which occurred between builders and suppliers.
- Provided technical support for the code implementation date delay.

--Created an IRC / IECC Code Traceable Test Suite (CTTS) for quantifying emissions reductions.

-- Required for quantifying emissions reductions – note that this is the only IRC / IECC CTTS ever designed and implemented.

-- Allows testing of other Home Energy Rating System (HERS) software. Energy Star approved as an alternate to IRC / IECC Codes based on CTTS testing.

-- Version 1 completed, additional enhancements are required.

-- Review of CTTS by USDOE National Labs underway.

FUNDING STATUS

In SB 1 (General Appropriations Act), the Texas Engineering Experiment Station was appropriated $1,363,060 for FY2002 and $1,293,060 for FY 2003 out of the Texas Emission Reduction Plan Fund to perform the ESL's responsibilities under SB5. The ESL's budget was then projected to be reduced to approximately $250,000 per year for the first two years. The Laboratory has currently received $105,000 through April of 2002.

GOALS / TIMELINE

With the current funding situation, the majority of the ESL's efforts are with a minimal amount of staff, and in a reactionary mode responding to emergencies. The Laboratory is performing the following SB5 activities.

- Support training	On-going
- Quarterly Stakeholder meetings	On-going
- Respond to Municipal requests	On-going
- Respond to Builders, Manufacturers, Others	On-going
- Update Web, improve communications	On-going
- Support the TNRCC on the Emissions Reduction Reporting	due 6/15/02
- Release Home Energy Rating System (HERS) rating format	due 9/1/02

CHALLENGES / SUCCESSES

The key challenge has been the lack of funding. This ripples through all activities and creates situations where the ESL must focus on strictly emergency situations. In general, the cooperation and enthusiasm of all parties (including builders/builder groups, manufacturers, public interest groups and other agencies) has been excellent.

The funding reduction has seriously slowed the Laboratory's progress in making the code adaptation a smooth process in Texas. Builders are struggling with understanding the codes and also face liability issues that they do not fully

understand. Manufacturers are faced with making large tooling investments and have numerous unanswered questions on specific code requirements that impact these investment decisions. State agencies are struggling with how to acquire and validate the needed data to build the required reports to EPA.

In spite of these challenging obstacles, the ESL has seen successes:

The SB 5 Stakeholder Group forms a core group for obtaining a general consensus as the state attempts to proceed towards implementation of SB5. For this reason, the group has proven to be a critical tool. Members of the group communicate methods for implementation and their importance to their organizations and associates. This group also generates input that assists the ESL in prioritizing the tasks the Laboratory is facing so that the highest need tasks can be addressed.

For example, builders have now generally decided to begin to use high efficiency windows, partially as a result of the communications that have occurred between stakeholders and their members. Breakthroughs such as these dramatically further the acceptance and success of SB5.

The success of the IRC/IECC Code Traceable Test Suite (Version 1) is also a major breakthrough. The Laboratory can now quantify code produced energy reductions. This has not existed in an open-to-review test suite before. The ESL is working with the engineers at the US Department of Energy, who wrote much of the simulation code, to make this the standard by which to quantify energy reductions due to code implementations. The test suite provides Texas with a solid method of quantifying reductions with the EPA.

The test suite has also allowed ESL to determine the conditions under which Energy Star would be an acceptable alternative to the IRC / IECC codes. Energy Star is an excellent program and has stimulated significant energy conservation. Energy Star is also used by a significant number of builders as a marketing tool to promote energy efficiency in their homes. Under most conditions, Energy Star creates a code or "above code" set of conditions for building a house. The ESL quantified these and approved Energy Star as an alternative to the IRC/IECC codes when these conditions are met. This will aid in the acceptance of SB5 and strengthen Texas' position with the EPA.

Numerous other materials have been produced by the Laboratory. The Builders Guide **(see Appendix F)** was created by the Laboratory and thoroughly reviewed by members of the Stakeholders Group. This document is available on the Laboratory's Web site and in a printed, laminated format for distribution. This allows builders to simply check their climate zone and look up key parameters required under the IRC/IECC codes. Non-municipal areas also have had to comply with the IRC / IECC codes but did not have the capability to do so. A Self-Certification Form was designed by the Laboratory, and again thoroughly reviewed with the Stakeholder Group. This form addresses a serious concern that builders have expressed.

The ESL has also resolved several discrepancies in the IRC / IECC with the International Code Congress. Numerous technical issues have been successfully resolved through cooperation with this group.

COMMENTS / CONCERNS FROM PUBLIC AND INDUSTRY

Many of the concerns noted by industry are included in other parts of this section, including:

- Duct insulation
- Energy Star approvals
- Home Energy Rating Systems
- Effective dates for provisions of this legislation
- Detailed code issues and conflicts
- Window issues
- Builder training and liability issues
- Code official ability to implement inspections
- Lack of programmatic funding to facilitate implementation

Cost and health impacts from the adoption of the codes have also arisen as a major issue. Cost impact needs to be studied and documented. In many cases, slight changes in construction methods can result in both cost savings and improved energy efficiency. Health is directly related to moisture in the inside air (and in the walls, etc) and tightness of the house. Improvements and higher skill in designing and installing mechanical cooling and heating equipment in residences will be required as the house becomes more efficient. The Laboratory needs to demonstrate and make these methods available to Texas builders.

TEXAS COUNCIL ON ENVIRONMENTAL TECHNOLOGY (TCET)

Duties as established in SB 5:

Sec. 386.051 Texas Emissions Reduction Plan

(b) The commission, the comptroller, and the council will provide grants and funds for:

(1) The diesel emissions reduction incentive program

(2) The motor vehicle purchase or lease incentive program

(3) The new technology research and development program

****

"Today, the Houston Galveston area has a real challenge in ensuring healthy air for its citizens and in complying with national health-based standards," said Gregg Cooke, Regional Administrator for the U.S. Environmental Protection Agency, Region 6 (Dallas). "In addition to ongoing local efforts to combat air pollution, we encourage the development of new technologies which will be crucial in achieving and maintaining clean air." The Houston Galveston area is not alone in its challenge. In Texas there are four non-attainment areas as well as several near-nonattainment areas.

The objective in the creation of the Texas Council on Environmental Technology (TCET) is to streamline and expedite the process whereby the TNRCC and the EPA give recognition of and credit for new, innovative and creative technological advancement. The creation of this council will not only assist the EPA and TNRCC, but will spur the entrepreneurial and inventive spirit of Texans to help develop new methods to solve old problems.

Senate Interim Committee on Natural Resources
Report to the 78th Legislature
Compliance with FCAA / Establishment of TERP Advisory Committee

Acknowledging the challenge of compliance with the Clean Air Act without severe economic hardships, Governor Rick Perry and Senator J. E. "Buster" Brown jointly announced the formation of the Texas Council on Environmental Technology (TCET). The function of TCET is to evaluate, seek EPA approval for, and facilitate the deployment of new technologies. The Council must have an accelerated agenda to meet and start on grant applications to the Environmental Protection Agency, and to determine if any legislative action is needed to address the requirements imposed by the federal Clean Air Act.

Stakeholders in this immediate challenge to the non-attainment areas of Texas include the EPA, Department of Energy (DOE), TNRCC, local officials, and local and regional Economic Development Council representatives, and several of Texas' business leaders - all who are concerned and affected by the situations the state currently faces and will face in the future regarding air and water.

TCET is working to provide technical evaluations of new technologies and define critical technologies needed for air or water quality. TCET has established a working relationship with EPA, DOE, and TNRCC in an attempt to fast track approvals for evaluated technologies.

<u>TCET's functions are as follows:</u>

--Review, screen, and recommend cost effective environmental technologies for approval by EPA.

--Establish an environmental technologies clearinghouse.

--Establish applied research objectives.

--Recommend the initiation of specific air/water pollution research projects.

--Receive and review air and water pollution research proposals.

--Participate in federally and other non-state funded technology transfer initiatives.

--Establish the administrative and review procedures necessary to fulfill TCET's mission.

TCET is made up of highly regarded academic leaders and representatives of major universities. Nominations were taken and Governor Perry and Senator Brown made the appointments.[1] The TCET membership is as follows:

Name	Affiliation
Dr. David Allen	UT-Austin
Dr. Randy Charbeneau	UT-Austin
Dr. Charles Holland	Texas A&M
Dr. Dale Klein	UT-Austin
Dr. P.K. “Sandy” Dasgupta	Texas Tech
Professor Mark Weisner	Rice University
Arthur C. Vailas	University of Houston
Dr. Deborah J. Roberts	University of Houston
Dr. Neal R. Amundson	University of Houston
Dr. Kuruvilla John	Texas A&M-Kingsville
Kyriacos Zygourakis	Rice University
Dr. John Appleby	Texas A&M
Dr. Richard Wm. Tock	Texas Tech

[1]The preceding information on TCET obtained from the TCET website -- http://www.tcet.state.tx.us/

TERP RELATED DEVELOPMENTS

LITIGATION

H.M. Dodd Motor Co., Inc. and Autoplex Automotive, L.P. v.Texas Department of Public Safety, et al

After SB5 was signed into law, several automobile dealers filed a lawsuit contesting the implementation of the $225 out-of-state vehicle inspection fee, and Judge Lora Livingston of Travis County ruled that the fee was unconstitutional. The auto dealers' claims regarding this fee are as follows:

1) the fee violates the Commerce Clause of the United States Constitution
2) the fee violates the auto dealers' right to equal protection under the Fourteenth Amendment of the United States Constitution
3) the fee violates the auto dealers' right to equal protection under the Texas Constitution

The fees and surcharges created by SB 5 were projected to generate an annual budget for the TERP of approximately $137 million. Without the $225 out of state vehicle inspection fee, the funding available for the TERP has been reduced to $30 million annually. The SIP proposed for the Houston-Galveston area was approved by the EPA in October, 2001 and took into consideration the emissions reductions that the TERP would produce, as originally funded. The SIP for the Dallas-Fort Worth still awaits approval by the EPA.

The limitations that the reduced funding has placed on the implementation of the TERP may:

--lead to the eventual failure to attain the national ambient air quality standard for ozone in the Dallas-Fort Worth and Houston-Galveston areas
--result in federally imposed plans and controls to replace state plans
--result in imposition of sanctions such as loss of federal highway funds.

Business Coalition for Clean Air Appeal Group (BCCA-AG) v. TNRCC

After the BCCA filed a lawsuit challenging the restrictions of the HGA SIP, settlement negotiations produced a scientific study of the air quality in the HGA. The following, denoted by italic print, is taken directly from the TNRCC's "Technical Support Document", dated June 5, 2002. The document was prepared by the Technical Analysis Division - Air Modeling and Data Analysis Section, and provides a brief background and status report regarding the decision by the TNRCC Commissioners to endorse the proposed shift in required NOx emissions by industrial sources in the Houston-Galveston Area from 90% to 80%.

Executive Summary
June 5, 2002

Background
In August and September of 2000, more than two hundred scientists participated in an intensive field study in the Houston-Galveston area (HGA) to study ozone and other air pollution issues. The findings from this study are constantly

evolving and have raised questions about the cause(s) of high ozone in the HGA. Coincidentally, as a result of settlement negotiations with the BCCA-AG, TNRCC staff has focused on the question "Can VOC industrial controls be substituted for some of the last 10% of industrial NOx controls?"

Conclusions

Several detailed analyses have provided a directional indication that it may be possible to achieve the same level of air quality benefits with reductions in industrial olefin emissions, combined with an 80% reduction in NOx emissions from industrial sources, as would be realized with a 90% reduction in industrial NOx emissions. This preliminary indication is based on results from a sophisticated box model, which was set up to replicate actual air samples taken during the study; new analysis of the September 1993 episode using advanced meteorological models combined with a top-down adjustment to the point source olefin emissions; and modeling of a new 2000 episode, also using a top-down adjustment to point source olefin emissions. Further refinements and enhancements are described in this document and additional modeling and analysis will be conducted in the next few months in hopes that a final determination can be made.

Assessment

Initial efforts were focused on the most remarkable findings - that a select number of highly reactive VOC's - ethylene, propylene, and 1, 3 butadine contributed to very large portions of reactivity observed airborne samples. As scientists completed more detailed analyses, other reactive VOC's, isorene, butenes, formaldehyde, acetaldehyde, toluene, pentenes, trimethylbenzenes, xylenes and ethyltoulenes, may be found to possibly contribute to ozone production in the

HGA. Other scientists also may have indicated that large amounts of less reactive VOC emissions have contributed to ozone production I the HGA. At this time, TNRCC has not been able to analyze the role of these additional VOC's in ozone production in Houston, but plans to conduct that analysis prior to the mid-course review SIP revision.

The high concentrations of light olefin seen in the HGA are almost certainly not due to mobile source emissions. On-road studies in Houston and elsewhere in the United States indicate ethylene and acetylene are released by mobile sources in a characteristic ratio; in Houston, the ethylene/acetylene ratio is much larger, indicting other sources of ethylene.

Measured concentrations of light olefins form aircraft sampling in the HGA appear to be much higher than expected based on the 1999 reported emissions inventories.

Additional support is provided form the results of Lagrangian modeling, which follows the progress of a single parcel of air as it moves with the wind. This modeling indicates NOx emissions are reasonably accurate, but ethylene and propylene emissions may be severely underestimated. After ethylene and propylene emissions were adjusted to the observed level, the ozone, formaldehyde, acetaldehyde, PAN, and HNO3 concentrations produced by the model agree with the observations. Failure to adjust the proylene and ethylene to observed values, results in poor model performance. Discrepancies between olefin and NO_y ratios are likely to be persistent, not episodic. Analysis of 2000 and 2001 aircraft and special monitoring data indicates that the observed olefin/NO_y ratios were drastically larger than the inventory in August and

September of 2000 and in October 2001.

Analysis conducted on the modeling of the September 8-11, 1993 episode provides a directional indication that it may be possible to substitute olefin reductions for the 10% of point source NOx reductions if olefin emissions in the model are six times as large as in the original modeling demonstration. With the scaled-up olefin emissions in the model, the required olefin reduction from industrial sources varied from 27% to 90%.

The complex box model simulating the chemical composition of air quality samples taken in the Houston Ship Channel area in August and September 2000 and using more than 800 chemical species and 2200 reactions provides a directional indication that the last 10% of NOx reductions may be replaced with industrial olefin reductions.

Analysis from the modeling of the August 25 - September 1, 2000 episode also provides a directional indication that the last 10% of NOx reductions may be replaced with industrial source olefin reductions. The required olefin reductions from industrial sources varied from 8% to 27%. Note that the 2000 episode is under development, and these reduction percentages may change.

There is also analysis that demonstrates smaller olefin reductions form industrial from industrial sources may be made combined with an 85% reduction of NOx reductions from industrial sources. The combinations ranging from olefin reductions of 4% to 54% with an 85% NOx industrial reduction may achieve the same levels of air quality improvement.

TNRCC will continue to make improvements and enhancements to the photochemical air quality modeling and emissions inventory, and will analyze new data as it becomes available.

Brazoria County, et al v.TNRCC

Several counties in the HGA filed suit against the TNRCC to prevent the imposition of the HGA SIP in their counties. Initially, Brazoria County, Fort Bend County and Montgomery County began legal action, but Montgomery County later decided to withdraw from the litigation. While settlement negotiations between Fort Bend County and the TNRCC are currently underway, the following schedule has been set for the litigation:

May 10th	Counties file initial brief
June 28th	Deadline for TNRCC to reply
July 19th	Deadline for counties to reply
August 19th	Trial scheduled to begin

The counties contested the HGA SIP based on the following grounds:

1) the 55 mph speed limit rule
2) the motor vehicle inspection and maintenance rule
3) the commercial lawn and garden equipment rule (forbidding commercial operators of lawn and garden maintenance equipment from operating machinery before noon during the ozone season)
4) the construction equipment shift rule (similar to the lawn and garden equipment shift rule, but applicable to bulldozers and other non-road construction equipment)
5) the rule requiring cutbacks of NOx emissions from factories, electric generating facilities, and the like.

SIGNIFICANT CORRESPONDENCE

On June 3, 2002, a letter was issued from Senator Brown to all members of the Texas Legislature. The letter offered a potential avenue to restore the original funding that has resulted from litigation challenging SB 5. (see Appendix K)

Gregg Cooke, Regional Administrator for EPA Region 6, issued a response letter to Senator Brown on July 25, 2002 stating that the Legislature must restore the original TERP funding or find equivalent pollution reduction measures. (see Appendix L) The issuance of Mr. Cooke's letter coincided with his submission of two Federal Register notices which state that, should funding for SB 5 not be restored, the HGA SIP will lose its approved status and the DFW SIP will fail to gain EPA approval. (see Appendix M)

ATTORNEY GENERAL OPINIONS

Compliance Dates **(see Appendix G)**

In response to some ambiguity that arose as to the date that new construction in unincorporated areas of the state must begin compliance with the energy performance standards prescribed in Chapter 388 of the Health and Safety Code, Senator Brown requested an opinion on the matter from the Texas Attorney General, John Cornyn. General Cornyn's response stated, "We conclude that new construction must have begun complying as of September 1, 2001, which is the effective date of Chapter 388 generally." [2]

TCET **(see Appendix H)**

As TCET began the process of reviewing proposals for grant money to develop new environmental technologies, a conflict-of-interest question arose among the members of the council. Because the TCET membership is made up of

[2] Attorney General Opinion No. JC-0457

members of academia from universities around the state, Senator Brown requested an Attorney General's Opinion as to whether TCET may award a grant to one of its members or to a university that employs a member. Attorney General John Cornyn responded with the following statement, "Under common law, if an officer of a governmental body has an interest in a contract before the body, the governmental body may not enter the contract."[3]

LEGISLATIVE LETTERS OF INTENT

R-8/R-6 Duct **(see Appendix I)**

The Energy Systems Laboratory at Texas A&M, in response to concerns expressed by builders and builders associations as to the limited availability of the R-8 flexible duct required by the energy performance standards as stated in the International Energy Conservation Code, requested a legislative letter of intent from Senator Brown to clarify the confusion. Senator Brown responded by issuing a March 1, 2002 letter stating that, "The intended date for use of R8 flexible duct is February 1, 2003" and, "An exception to use R6 insulated duct code requirement should be allowed for until February 1, 2003." [4]

Compliance Dates **(see Appendix J)**

Following the issuance of Opinion Number JC-0457 by Attorney General John Cornyn which addressed the date for compliance with the International Energy Conservation Code by builders in unincorporated areas of the state, Senator Brown issued a legislative letter of intent dated April 30, 2002 regarding the

[3] Attorney General Opinion No. JC-0484

[4] March 1, 2002 Correspondence from the Honorable J.E. "Buster" Brown to Charles Culp, P.E., Ph.D. & Bahman Yazdani, P.E. - Energy Systems Laboratory, Texas A&M.

matter, stating that, "During floor debate in the House of Representatives, Senate Bill 5 was amended in an attempt to relieve smaller counties of the burden of enforcing the provisions of Chapter 388. However, the amendment inadvertently omitted counties from the September 1, 2002 effective date provision" and that "the intent of the legislation was to have a uniform compliance date (September 1, 2002) for the municipalities and unincorporated areas." [5]

OTHER IMPORTANT DEVELOPMENTS

55mph speed limit

The December 2000 SIP revision included a speed limit reduction for the HGA. The revision was to reduce the speed limit to 55mph on all roadways with a posted speed above 55mph in the 8-county area by May 1, 2002.

The EPA approved a new system for mobile source testing in January of 2002. The results of the new models formulated by this system showed that the speed limit reduction to 55mph would produce only 6 tons of emissions reductions a day, with only 1.6 tons of that coming from cars and light trucks. This is in contrast to the 12 tons per day reduction that earlier testing had shown would result. This new data, combined with complaints and concerns expressed by state and local officials from the outlying areas around Houston, spurred the TNRCC staff to formally propose the repeal of the 55mph speed limit until at least May 2005. Under this proposal, 55mph speed limit would remain in effect for trucks in excess of 10,000 pounds. The TNRCC Commissioners agreed to suspend the 55mph speed limit on Houston area freeways, however, procedures

[5] April 30, 2002 Correspondence from the Honorable J.E. "Buster" Brown to Douglas Gilliland - Texas Association of Builders.

required to reinstate the 70 mph speed limit could potentially not be completed until spring of 2003.[6]

RECOMMENDATIONS

The most significant roadblock in fulfilling the provisions of SB5 has been the shortfall in available funds and the Senate Natural Resources Committee recommends that the Legislature restore all funding necessary to implement and operate the Texas Emissions Reduction Plan in its full capacity. In addition to the significant decrease in available funds, there are several other issues that should be addressed:

Recommendations concerning TNRCC:

--Vehicles and engines that are replaced using TERP funds should be removed from the near nonattainment area to prevent the continued use of "dirty" engines.

--Clarify that the grant programs should cover purchases of new heavy duty vehicles. This will allow more flexibility by allowing the purchase of new heavy duty vehicles to be eligible for both the rebate and grants programs.

--For the definition of new purchases, re-powers and retrofits, a 30% reduction from current standards is required. To achieve the goal of greater emission reduction, the 30% reduction requirement should refer to the old engine. The definition should be changed to require a 30% reduction from the engine that is

[6] 06/06/02 ed., Austin American-Statesman, "Houston ozone plan under revision", Kevin Carmody.

being replaced.

--Remove the cost effectiveness criteria for infrastructure projects. There has been much more interest in infrastructure projects than there is funding available. In the alternative, provide that infrastructure projects that are part of a vehicle retrofit package will not be considered infrastructure projects and subject to the 3% cap.

--Remove the HOV lane incentive for clean cars. This will cause significant federal HOV lane funding problems if continued.

--Rebate program should clearly include all fuels, not just diesel fuel. Current language in SB 5 requires that all fuels other than diesel fuel be excluded from the rebate program.

Recommendations concerning SECO:

--Define "political subdivision." Under the broadest definition, there are many political subdivisions that don't have the capacity to reduce their energy use (i.e. water improvement districts, municipal utility districts, appraisal districts, etc.). The greatest impact will be through cities, counties, community colleges and other large districts.

--Redirect the legislative reference contained in 388.005 (b). The current language can be interpreted to mean that an entity must use energy-saving performance contracting. Instead, the language could more generally define "cost effective," i.e. any project that can be paid for with the resultant savings.

--Allow for a more reasonable explanation of why a political subdivision has not met the 5 percent goal. An entity may not have met the 5 percent goal but still completed all of the cost effective projects available to them. Cities that have historically been very progressive in energy management may have great difficulty it reducing their use below the 2001 baseline.

--Identification of all "political subdivisions" within the affected areas. While SECO was not charged with contacting these entities, this office feels it is an important part of providing information and technical assistance. If the definition were refined to include only the larger energy consuming districts, more efficient use of existing resources would be possible.

--Historically, Texas has experienced relatively low utility rates. Energy has not been a high priority on the list of things to be "managed" and little connection has been made to energy efficiency and emissions. Continued education on the relationship between energy efficiency and clean air must remain a priority.

--Better coordination and outreach efforts by agencies charged with implementation. Now that appointments are made, the TERP Advisory Board may well serve this need.

<u>Recommendations concerning the Tax Administration Division:</u>

--Consider amending Chapter 151 of Tax Code to impose the off-road, heavy-duty diesel equipment surcharge on purchases of equipment subject to use tax.

--Consider amending Chapter 152 of Tax Code to impose the diesel-powered, on-road motor vehicle surcharge on vehicles subject to use tax (acquired out-of-state, to be operated in Texas).

Recommendations concerning PUC:

--Increase funding available for Energy Efficiency Grant Program to enable PUC to award more grants as part of the program.

Recommendations submitted by ESL:

--Ensure funding for the ESL to fulfill its responsibilities under SB5. With funding, the ESL could produce over 100 targeted training sessions per year focused on specific groups. The ESL would then be able to respond and effectively work with municipalities to improve their code and above code modifications in a responsive manner. The ESL would then be able to work with manufacturers to make sure that they understand the impact of the codes to their product lines and help assure that the required products are on the market in a timely fashion.

-- As the ESL goes forward, data will be needed from ERCOT. The ESL can determine the energy reductions in the municipalities and counties using a variety of methods. Ideally, ESL would like to have a "1-sheet" list of key code parameters on each building with it's location. The ESL will have the computer systems in place to then determine the location and quantify the energy reductions. Next, this hourly energy reduction profile needs to be tied to a particular power plant, which has specific operating conditions on NOx emissions. ERCOT data will be required for this.

The reduction of hourly NOx output of the power plant needs to be put into an

atmospheric model (i.e., Ozone day or August-September 2000 Episode day) to determine the reduction in ozone. Although this description is overly-simplified, three groups must work closely together to accomplish this task. These are the ESL, ERCOT and the UT Atmospheric Sciences Group. This group can put a solid, defensible set of ozone reductions forward to the US EPA. The legislature could address how to allow these data to be acquired as truly needed. Deregulation of the electric utilities is also complicating the acquisition of needed data.

--Additional work needs to be done in quantifying and demonstrating the cost associated with building to code standards. Cost will increase due to added insulation, higher efficiency windows, higher efficiency air-conditioners and other added items. Cost will decrease due to being able to down-size air-conditioners and furnaces and some other potential design changes like high efficiency ducts. Also, energy bills will decrease. “Back of the envelope” calculations show that the initial cost increase can be $1,000 to $2,000 or so, depending on what is done. A payback of under 3 to 5 years should be expected. Technologies are being developed to enable the first cost to be less than the old building methods, allow better comfort and improved energy efficiency. The ESL needs to participate in developing, demonstrating and training builders in these technologies and methods.

--Increase code adoption for residential homes. Homeowners are concerned with increased occurrence of asthma in children and other health related afflictions related to a “tighter” building. A tighter building can be a healthier building, if it is designed and maintained correctly. The ESL is ideally situated to provide the education and training on how to make the code adoption a major plus on

improving the health of indoor environments.

--Construct two or three “showcase houses on wheels” to demonstrate energy efficiency building techniques. This activity would address builder reluctance to accepting the energy codes. These showcase houses would be brought to Home Shows, State Fairs and other high traffic opportunities to demonstrate the impact of high efficiency windows, air-conditioners and other equipment, duct sealing, building envelop sealing and other energy efficiency technologies. The audience would be builders, local officials and home-buyers.

--Focus on Hard-To-Reach Areas. Hard to reach areas are a particular challenge because most of these areas do not have an infrastructure in their local government to support technical initiatives. The ESL proposes to train graduate students for direct interface with local officials, builders and homeowners to assist in delivering the needed skills to enable implementation of the energy efficiency requirements of SB5.

--Study impact of manufactured homes and determine where cost effective enhancements should be done. Manufactured homes are not subject to the IRC / IECC codes. Due to the low first cost of this housing, manufactured housing is experiencing an increase in market share and will likely negatively impact energy efficiency measures being taken in site-built housing. The ESL would work with manufacturers to determine the optimal improvements to make this housing more efficient. We would be looking at standards (above the federally mandated ones), which improve the cost efficiency and indoor air quality of this housing without adding a cost burden.

--Capture and document the energy savings in the Texas LoanSTAR and Rebuild America programs currently in place. Currently, Texas has documented over $100 million in energy savings in hundreds of buildings around the State of Texas. However, Measurement and Verification (M&V) on most of these buildings has been discontinued. Several studies by the ESL have shown that 20 to 30%+ of the savings will erode over time if these buildings are not carefully monitored. Therefore, restarting the monitoring in these buildings and recommissioning the HVAC systems will likely produce well over $10 million in real dollar savings per year to the state and also have verifiable emissions reductions.

Recommendations concerning TCET:

--Modify legislation to allow Universities whose employees are members of the Council to receive grant awards. Possible language for overcoming the current prohibition of universities represented on the council is provided in the Attorney General's Opinion No. JC-0484:

"Of course, the legislature may adopt a statute that overcomes the common-law conflict-of-interest rule in this circumstance. See Tex. Att'y Gen. Op. No. JC-225 (2000) at 3 (stating that legislature may adopt statute that overcomes common-law incompatibility doctrine). The statutes governing the Telecommunications Infrastructure Fund, for instance, explicitly address a situation in which a member of the Telecommunications Infrastructure Fund Board may be employed by an entity applying for a grant or loan from the board:

If a board member is an employee of an entity that applies for a grant or loan

under this subchapter, the board member, before a vote on the grant or loan, shall disclose the fact of the member's employment. The disclosure must be entered into the minutes of the meeting. The board member may not vote on or otherwise participate in the awarding of the grant or loan. If the board member does not comply with this subsection, the entity is not eligible for the grant or loan."

--Section 387.008 can be modified to specifically allow TCET to seek grants and to manage environmental technology projects (such as the Texas Industries of the Future activities, funded by the Department of Energy). The section in question is given below.

SB 5. Sec.387.008.ENVIRONMENTAL RESEARCH FUND. (a)The environmental research fund is an account in the general revenue fund. The fund consists of money from gifts, grants, or donations to the fund for designated or general use and from any other source designated by the legislature.
(b)Money in the environmental research fund may be used only for the operation and projects of the Texas Council on Environmental Technology.

Frank Knapp of the Attorney General's office has suggested that TCET is not empowered to seek and receive grants, nor to manage grants received from non-state sources. TCET would like to be able to leverage the State's investment in environmental technologies by seeking other private or governmental support (especially federal support). Therefore, TCET requests the authority to seek and to manage grants from private, local government, or federal sources.

--Current funding for TCET's administrative operations is adequate to post RFPs, issue grants, and initiate contracts for awarded projects. However, to monitor project progress, to disseminate information about project accomplishments to appropriate interests, to track technology deployment into the marketplace, and to provide estimates of environmental impact by commercialization of funded projects, TCET would like authority to impose a 10% project management charge on grants in order to support such essential and complementary functions to current activities.

--TCET should be granted authority to carry unexpended balances (UB) forward into succeeding fiscal biennia. The nature of funding for TCET (supported by collection of fees designated in SB5 and reported monthly by the Comptroller's Office) creates a major problem in fully awarding and funding grants. TCET cannot know until after the end of the fiscal biennium how much money it has to make awards, and thereby cannot encumber unknown fund amounts collected in the last month of the biennium, nor could contracts be executed expediently enough to encumber funds even if fund amounts were known. In practice, the current inability of TCET to carry over funds would cause months of collections to be unused for environmental technology grant support.

--The council seeks legislative guidance on the importance of promoting the development of an environmental technology demonstration and evaluation infrastructure within the State. Council members suggest that building this type of infrastructure (e.g., enhanced diesel engine testing capabilities) is a very important complement to grants for particular technologies. The 8-year horizon of SB5 is intended to solve the short-term challenge of addressing ozone non-compliance in 4 areas of the state, but continued growth in the state's

population and economy will require on-going technology development and improvement. The Council suggests expanding its charge to include promoting the development of environmental technology demonstration and evaluation infrastructure.

TERP Advisory Board

When appointments by the Governor, Lieutenant Governor and Speaker of the House were completed in May of 2002, the TERP Advisory Board scheduled its first meeting for June 13, 2002 to be held at the TNRCC in Austin. Representative Warren Chisum was elected as the presiding officer by the members of advisory board at this initial meeting. The advisory board will review the TERP and recommend to the TNRCC changes to revenue sources or financial incentives as well as any legislative, regulatory, or budgetary changes needed. The TNRCC is to provide necessary staff to aid the advisory board, as expressed in SB 5.

The advisory board consists of 15 appointed members and seven ex officio members who will provide recommendations to the TNRCC regarding the implementation of the programs in SB 5.

The TERP Advisory Committee consists of the following members:

The Governor has appointed:

- Dr. Purnendu Dasgupta of Lubbock is a Paul Whitfield Horn Professor of chemistry and biochemistry at Texas Tech University, as the representative of the Texas Council of Environmental Science and Technology.

- John Goodman of Houston is the chairman of the board of directors of Goodman Global Holdings, Inc., as the representative of the air conditioning manufacturing industry.
- L. Elizabeth Gunter of Austin is the senior counsel for American Electric Power, as the representative of the electric utility industry.
- Dr. Naomi Lede' of Huntsville is a senior research scientist at the Texas Transportation Institute, as the representative of regional transportation.
- Mark Rhea of Fort Worth is the vice president of Lisa Motor Lines, as the representative of the trucking industry.

The Speaker has appointed:

- Clay Cash, as the representative of the fuel industry (no biographical information available).
- Reggie James, Director, Consumers Union, Southwest Regional Office, as the representative of consumer groups.
- Robert Lanham, vice president of Williams Brothers Construction Co. Inc., Houston, as the representative of the construction industry.
- Bill Mason as the representative of the agriculture industry (no biographical information available).
- Chuck Nash, San Marcos, Texas automobile dealer, as the representative of the automobile industry.

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The Lieutenant Governor has appointed:

- Jim Crites, Deputy Executive Director, Dallas/Fortworth International Airport, as the representative of the air transportation industry.
- Michael Flores, as the representative of the energy-efficient construction industry (no biographical information available).
- John Mikolitis, as the representative of the engine manufacturing industry (no biographical information available).
- Bruce Rauhe, Center for Fuel Cell Research, Houston Advanced Research Center, as the representative of the fuel cell industry.
- Tom "Smitty" Smith, Director of Public Citizen's Texas Office, as the representative of the environmental community.

The Ex officio members of the TERP Advisory Board as established in SB 5 are:

- Senator J.E. “Buster” Brown, Chairman, Senate Natural Resources Committee
- Representative Warren Chisum, Chairman, House Environmental Regulation Committee
- Dan Kelly, Representative of the Railroad Commission of Texas
- Carol Keeton Rylander/Dub Taylor, Representative of the Comptroller’s office
- David Dewhurst/Susan Ghertner, Representative of the Texas General Land Office
- Gregg Cooke, Representative of the US Environmental Protection Agency
- Jeffrey A. Saitas, Representative of the Texas Natural Resources Conservation Commission

APPENDIX A -- TNRCC GRANT RULES

SUBCHAPTER K: MOBILE SOURCE INCENTIVE PROGRAMS

DIVISION 3: DIESEL EMISSIONS REDUCTION INCENTIVE PROGRAM FOR ON-ROAD AND NON-ROAD VEHICLES

§§114.620 - 114.622, 114.626, 114.629

§114.620. Definitions.

Unless specifically defined in the TCAA or in the rules of the commission, the terms used in this subchapter have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms which are defined by the TCAA; and §§3.2, 101.1, and 114.1 of this title (relating to Definitions), the following words and terms, when used in this division shall have the following meanings, unless the context clearly indicates otherwise.

(1) Cost-effectiveness - The total dollar amount expended divided by the total number of tons of nitrogen oxides emissions reduction attributable to that expenditure.

(2) Incremental cost - The cost of an applicant's project less a baseline cost that would otherwise be incurred by an applicant in the normal course of business and may include added lease or fuel costs as well as additional capital costs.

(3) Motor vehicle - A self-propelled device designed for transporting persons or property on a public highway that is required to be registered under Texas Transportation Code, Chapter 502.

(4) Non-road diesel - A piece of equipment, excluding a motor vehicle or on-road diesel, that is powered by a non-road engine, including: non-road non-recreational equipment and vehicles; construction equipment; locomotives; marine vessels; and other high-emitting diesel engine categories.

(5) Non-road engine - An internal combustion engine that is in or

on a piece of equipment that is self-propelled or that propels itself and performs another function, excluding a vehicle that is used solely for competition, or a piece of equipment this is intended to be propelled while performing its function, or a piece of equipment designed to be and capable of being carried or moved from one location to another.

(6) On-road diesel - An on-road diesel-powered motor vehicle that has a gross vehicle weight rating of 10,000 pounds or more.

(7) Qualifying fuel - Any liquid or gaseous fuel or additives registered or verified by the EPA that is ultimately dispensed into a motor vehicle or on-road or non-road diesel that provides reductions of nitrogen oxides emissions beyond reductions required by state or federal law.

(8) Repower - To replace an old engine powering an on-road or non-road diesel with:

(A) a new engine that emits at least 30% less than the nitrogen oxides (NO_x) emissions standard required by federal regulation for the current model year for that engine;

(B) an engine manufactured later than 1987 that emits at least 30% less than the NO_x emissions standard emitted by a new engine certified to the baseline NO_x emissions standard for that engine;

(C) an engine manufactured before 1988 that emits not more than 50% of the NO_x emissions standard emitted by a new engine certified to the baseline NO_x emissions standard for that engine; or

(D) electric motors, drives, or fuel cells.

(9) Retrofit - To equip an engine and fuel system with new emissions-reducing parts or technology verified by the EPA after manufacture of the original engine and fuel system.

§114.621. Applicability.

Any person that owns or leases, or intends to own or lease, one or more on-road or non-road diesels that operate, or will operate, within an affected county as defined by §114.629 of this title (relating to Affected Counties and

Implementation Schedule) may apply for a grant under the diesel emissions reduction incentive program.

§114.622. Incentive Program Requirements.

(a) Eligible projects include:

(1) purchase or lease of non-road diesels;

(2) emissions-reducing retrofit projects for on-road or non-road diesels;

(3) emissions-reducing repower projects for on-road or non-road diesels;

(4) purchase and use of emissions-reducing add-on equipment for on-road or non-road diesels;

(5) development and demonstration of practical, low-emissions retrofit technologies, repower options, and advanced technologies for on-road or non-road diesels with lower nitrogen oxides (NO_x) emissions;

(6) use of qualifying fuel;

(7) implementation of infrastructure projects; and

(8) other projects that have the potential to reduce anticipated NO_x emissions from diesel engines.

(b) For a proposed project as listed in subsection (a) of this section, other than a project involving a marine vessel or engine, not less than 75% of vehicle miles traveled or hours of operation projected for the five years immediately following the award of a grant must be projected to take place in a nonattainment area or affected county of this state.

(c) For a proposed project that includes a replacement of equipment or a repower, the old equipment or engine must be recycled, scrapped, or otherwise removed from all affected counties as defined by §114.629 of this title (relating to

Affected Counties and Implementation Schedule).

(d) To be eligible for a grant, the cost-effectiveness of a proposed project as listed in subsection (a) of this section must not exceed $13,000 per ton of NO_x emissions.

(e) Projects funded with a grant from this program may not be used for credit under any state or federal emissions reduction credit averaging, banking, or trading program except as provided under Texas Health and Safety Code, §386.056.

(f) A proposed project as listed in subsection (a) of this section is not eligible if it is required by any state or federal law, rule or regulation, memorandum of agreement, or other legally binding document. This subsection does not apply to:

(1) an otherwise qualified project, regardless of the fact that the state implementation plan assumes that the change in equipment, vehicles, or operations will occur, if on the date the grant is awarded the change is not required by any state or federal law, rule or regulation, memorandum of agreement, or other legally binding document; or

(2) the purchase of an on-road diesel or equipment required only by local law or regulation or by corporate or controlling board policy of a public or private entity.

(g) A proposed retrofit, repower, or add-on equipment project must achieve a reduction in NO_x emissions of at least 30% compared with the baseline emissions adopted by the commission for the relevant engine year and application.

(h) If a grant recipient fails to meet the terms of a project grant or the conditions of this division, the executive director can require that the grant recipient return some or all of the grant funding to the extent that emission reductions are not achieved or cannot be demonstrated.

§114.626. Monitoring, Recordkeeping, and Reporting Requirements.

Grant recipients must meet the reporting requirements of their grant which must occur no less frequently than annually.

§114.629. Affected Counties and Implementation Schedule.

(a) Applicable counties in the incentive program include: Bastrop, Bexar, Brazoria, Caldwell, Chambers, Collin, Comal, Dallas, Denton, El Paso, Ellis, Fort Bend, Galveston, Gregg, Guadalupe, Harris, Hardin, Harrison, Hays, Jefferson, Johnson, Kaufman, Liberty, Montgomery, Nueces, Orange, Parker, Rockwall, Rusk, San Patricio, Smith, Tarrant, Travis, Upshur, Victoria, Waller, Williamson, and Wilson.

(b) Equipment purchased before September 1, 2001 is not eligible for a grant under this program.

APPENDIX B - TNRCC REBATE RULES

SUBCHAPTER K: MOBILE SOURCE INCENTIVE PROGRAMS

DIVISION 1: ON-ROAD DIESEL VEHICLE PURCHASE OR LEASE INCENTIVE PROGRAM

§§114.600 - 114.602, 114.609

§114.600. Definitions.

Unless specifically defined in the TCAA or in the rules of the commission, the terms used in this subchapter have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms which are defined by the TCAA, §§3.2, 101.1, and 114.1 of this title (relating to Definitions), the following words and terms, when used in this division shall have the following meanings, unless the context clearly indicates otherwise.

(1) Incremental costs - The cost difference between the manufacturer's suggested retail price (MSRP) to purchase or lease a new on-road diesel vehicle certified by the EPA to meet the federal emission standards required at the date of its manufacture and the MSRP to purchase or lease a comparable new on-road diesel vehicle certified by the EPA to meet an emission standard at least as stringent as those specified in §114.609 of this title (relating to On-Road Diesel Vehicle Purchase or Lease Incentive Schedule).

(2) Lease - The use and control of a new on-road diesel vehicle in accordance with a rental contract for a term of twelve consecutive months or more.

(3) Lessee - A person who enters into a lease for a new on-road diesel vehicle.

(4) Motor vehicle - A self-propelled device designed for transporting persons or property on a public highway that is required to be registered under Texas Transportation Code, Chapter 502.

(5) New on-road diesel vehicle - An on-road diesel that has never been the subject of a first sale as defined under Title 43, Texas Administrative Code, §17.2 (relating to Definitions), either within this state or elsewhere.

(6) On-road diesel - An on-road diesel-powered motor vehicle that has a gross vehicle weight rating of 10,000 pounds or more.

§114.601. Applicability.

(a) The provisions of §§114.600, 114.602, 114.604, and 114.609 of this title (relating to Definitions; On-Road Diesel Vehicle Purchase or Lease Incentive Requirements; On-Road Diesel Purchase or Lease Incentive Reporting Requirements; and On-Road Diesel Vehicle Purchase or Lease Incentive Schedule) apply statewide subject to the availability of funding.

(b) A purchase or lease of an on-road diesel motor vehicle is not eligible if it is required by any state or federal law, rule or regulation, memorandum of agreement, or other legally binding document. This subsection does not apply to:

(1) an otherwise qualified purchase or lease, regardless of the fact that the state implementation plan assumes that the change in vehicles will occur, if on the date the incentive is awarded the change is not required by any state or federal law, rule or regulation, memorandum of agreement, or other legally binding document; or

(2) the purchase or lease of an on-road diesel motor vehicle required only by local law or regulation or by corporate or controlling board policy of a public or private entity.

§114.602. On-Road Diesel Vehicle Purchase or Lease Incentive Requirements.

(a) The purchase or lease of a new on-road diesel vehicle certified by the EPA to an emissions standard at least as stringent as those specified under §114.609 of this title (relating to On-Road Diesel Vehicle Purchase or Lease Incentive Schedule) shall be eligible for an incentive for the reimbursement of incremental costs not to exceed that specified under §114.609 of this title if the purchaser or lessee of the on-road diesel vehicle agrees to register the vehicle in this state and meets the requirements of this section.

(b) Only one incentive will be provided for each eligible new on-road diesel vehicle purchased or leased in the state.

(c) The incentive shall be provided to the lessee and not to the purchaser if the on-road diesel vehicle is purchased for the purpose of leasing the on-road diesel vehicle to another person.

(d) An incentive for the lease of an eligible new on-road diesel vehicle shall be prorated based on an eight-year lease term.

(e) A person eligible to receive an incentive under this section shall sign a certification that the person will operate the on-road diesel vehicle in this state for not less than 75% of the vehicle's annual mileage while owned or leased by the purchaser or lessee and while the purchaser or lessee resides within the state before the reimbursement of incremental costs can occur. The certification must contain, at a minimum:

(1) the name, address, telephone number, and proof of identification of the person receiving the incentive;

(2) the purchase date, manufacturer, model, model year, vehicle license number, vehicle identification number, gross vehicle weight rating, current odometer reading, and certified emissions standard of the new on-road diesel vehicle for which the incentive has been claimed under subsection (a) of this section; and

(3) a copy of the vehicle’s registration and purchase invoice, or lease agreement if applicable, to be attached to the certification.

§114.609. On-Road Diesel Vehicle Purchase or Lease Incentive Schedule.

(a) The incentives provided under §114.602 of this title (relating to On-Road Diesel Vehicle Purchase or Lease Incentive Requirements) for new on-road diesel vehicles manufactured on or after January 1, 2001 until September 30, 2002 shall be based on the following emission standards for oxides of nitrogen (NO_x) and accompanying reimbursement amounts:

(1) 2.5 grams per brake horsepower-hour (g/bhp-hr) of NO_x or less is eligible for up to $15,000; and

(2) 1.5 g/bhp-hr of NO_x or less is eligible for up to $25,000.

(b) The incentives provided under §114.602 of this title for new on-road diesel vehicles manufactured on or after October 1, 2002 until September 30, 2006 shall be based on the following emission standards for NO_x and accompanying reimbursement amounts:

(1) 1.2 g/bhp-hr of NO_x or less is eligible for up to $15,000; and

(2) 0.5 g/bhp-hr of NO_x or less is eligible for up to $25,000.

(c) After evaluating new technologies and after public notice and comment, the commission, in consultation with the Texas Emission Reduction Plan Advisory Board, may change the incentive emissions standards established under this section to improve the ability of the program to achieve its goals.

SUBCHAPTER K: MOBILE SOURCE INCENTIVE PROGRAMS

DIVISION 2: LIGHT-DUTY MOTOR VEHICLE PURCHASE OR LEASE INCENTIVE PROGRAM

§§114.610 - 114.612, 114.616, 114.618, 114.619

STATUTORY AUTHORITY

These new sections are adopted under Texas Water Code (TWC), §5.102, which provides the commission with the general powers to carry out its duties under TWC; §5.103, which authorizes the commission to adopt any rules necessary to carry out the powers and duties under the provisions of TWC and other laws of this state; and §5.105, which authorizes the commission by rule to establish and approve all general policy of the commission. These new sections are also adopted under THSC, TCAA, §382.017, which authorizes the commission to adopt rules consistent with the policy and purposes of TCAA; §382.011, which authorizes the commission to establish the level of quality to be maintained in the state's air and to control the quality of the state's air; §382.012, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; and Chapter 386, which establishes the TERP. Finally, these adopted new sections are required as part of the implementation of SB 5, acts of the 77th Legislature, 2001.

§114.610. Definitions.

Unless specifically defined in the TCAA or in the rules of the commission, the terms used in this subchapter have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms which are defined by the TCAA, §§3.2, 101.1, and 114.1 of this title (relating to Definitions), the following words and terms, when used in this division shall have the following meanings, unless the context clearly indicates otherwise.

(1) Bin or emissions bin - A set of emissions standards applicable to exhaust pollutants measured on the Federal Test Procedure according to Title 40 Code of Federal Regulations, §86.1811-04.

(2) Lease - The use and control of a new light-duty motor vehicle in accordance with a rental contract for a term of twelve consecutive months or more.

(3) Lessee - A person who enters into a lease for a new light-motor vehicle.

(4) Light-duty motor vehicle - A motor vehicle with a gross vehicle weight rating of less than 10,000 pounds.

(5) Motor vehicle - A self-propelled device designed for transporting persons or property on a public highway that is required to be registered under Texas Transportation Code, Chapter 502.

(6) New light-duty motor vehicle - A light-duty motor vehicle that has never been the subject of a first sale as defined under Title 43, Texas Administrative Code, §17.2 (relating to Definitions), either within this state or elsewhere.

§114.611. Applicability.

(a) The provisions of §§114.610, 114.612, 114.616, 114.618, and 114.619 of this title (relating to Definitions; Light-Duty Motor Vehicle Purchase or Lease Incentive Requirements; Manufacturer's Report; Vehicle Emissions Information Brochure; and Light-Duty Motor Vehicle Purchase or Lease Incentive Schedule) apply statewide subject to the availability of funding.

(b) A purchase or lease of a light-duty motor vehicle is not eligible if it is required by any state or federal law, rule or regulation, memorandum of agreement, or other legally binding document. This subsection does not apply to:

(1) an otherwise qualified purchase or lease, regardless of the fact that the state implementation plan assumes that the change in vehicles will occur, if on the date the incentive is awarded the change is not required by any state or federal law, rule or regulation, memorandum of agreement, or other legally binding document; or

(2) the purchase or lease of a light-duty motor vehicle required only by local law or regulation or by corporate or controlling board policy of a public or private entity.

§114.612. Light-Duty Motor Vehicle Purchase or Lease Incentive Requirements.

(a) The purchase or lease of a new light-duty motor vehicle certified by the EPA to an emissions standard at least as stringent as those specified in §114.619 of this title (relating to Light-Duty Motor Vehicle Purchase or Lease Incentive Schedule) shall be eligible for the incentive specified in §114.619 of this title if listed under §114.616 of this title (relating to Manufacturer's Report) and the purchaser or lessee agrees to register the vehicle in this state and meets the requirements of this section.

(b) A person who purchases or leases a new light-duty motor vehicle eligible for an incentive under subsection (a) of this section shall be eligible to receive an incentive specified in §114.619 of this title if the purchaser or lessee registers the new light-duty motor vehicle in this state and signs a certification that the person will operate the light-duty motor vehicle in this state for not less than 75% of the light-duty motor vehicle's annual mileage while owned or leased by the purchaser or lessee and while the purchaser or lessee resides within the state. The certification must contain, at a minimum:

(1) the name, address, telephone number, and proof of identification of the person receiving the incentive;

(2) the purchase date, manufacturer, model, model year, vehicle license number (if assigned), vehicle identification number, gross vehicle weight rating (if applicable), current odometer reading, and emissions test group number to verify the certified emissions standard of the new light-duty motor vehicle for which the incentive has been claimed under this section; and

(3) a copy of the vehicle's registration and purchase invoice, or lease agreement if applicable, to be attached to the certification.

(c) Only one incentive will be provided for each eligible new light-duty motor vehicle purchased or leased in the state.

(d) The incentive shall be provided to the lessee and not to the purchaser if the eligible new light-duty motor vehicle is purchased for the purpose of leasing the light-duty motor vehicle to another person.

(e) An incentive for the lease of an eligible new light-duty motor vehicle shall be prorated based on a four-year lease term.

§114.616. Manufacturer's Report.

(a) A manufacturer of light-duty motor vehicles sold in the state shall provide to the executive director, or his designee, a list of the new light-duty motor vehicle models that the manufacturer intends to sell in this state during that model year that are certified by the EPA to meet the incentive emissions standards listed under §114.619 of this title (relating to Light-Duty Motor Vehicle Purchase or Lease Incentive Schedule). The list must contain for each light-duty motor vehicle listed, at a minimum:

(1) the manufacturer name, model, and model year; and

(2) the test group, evaporative/refueling family, engine displacement, exhaust emission test fuel type, applicable emission standards, and certificate number as listed on the Certificate of Conformity issued by the EPA.

(b) Beginning January 1, 2002, the list required by subsection (a) of this section shall be submitted to the executive director, or his designee, at the beginning, but no later than July 1, of each year preceding the new vehicle model year.

(c) A manufacturer of new light-duty motor vehicles may supplement the list required by subsection (a) of this section to include additional new light-duty motor vehicle models the manufacturer intends to sell in this state during the model year.

(d) All new light-duty motor vehicle dealers and leasing agents statewide shall make copies of the list required under this section available to prospective purchasers or lessees of new light-duty motor vehicles.

§114.618. Vehicle Emissions Information Brochure.

(a) Beginning September 1, 2002, a manufacturer of new light-duty motor vehicles sold in the state covered under §114.616 of this title (relating to Manufacturer’s Report) shall publish and make available to its dealers for distribution to the dealers' customers by September 1 of each year, a brochure that includes at a minimum:

(1) a list of eligible new light-duty motor vehicles as required under §114.616 of this title;

(2) the emissions and air pollution ratings, not including fuel efficiency, for each eligible new light-duty motor vehicle listed under paragraph (1) of this subsection based on data from the EPA Green Vehicle Guide (http://www.epa.gov/greenvehicles/index.htm) and the light-duty motor vehicle Bin certification number;

(3) an indication of where the Bin certification information is located on each new light-duty motor vehicle listed under paragraph (1) of this subsection and a clear explanation of how to interpret that information; and

(4) information on how the consumer may obtain further information from the EPA Green Vehicle Guide; and

(5) the web address of the commission's Texas Emission Reduction Plan (TERP) program and specific information that the commission's website will include a complete list of all eligible light-duty motor vehicles that manufacturers intend to sell in this state.

(b) The brochure required under subsection (a) or (d) of this section shall be placed in a location within the dealer's showroom or sales area so that it is clearly visible and available for distribution to the dealer's customers.

(c) The brochure required under subsection (a) or (d) of this section shall have a page size no smaller than 8.5 inches by 11 inches and the information required under subsection (a)(1) - (4) of this section shall be printed in no less than 12-point type in a color contrasting with the intended background.

(d) Beginning September 1, 2002, a manufacturer of new light-duty motor vehicles sold in this state not covered under §114.616 of this title must publish a brochure that indicates that no eligible new light-duty motor vehicles will be available for purchase or lease within the state from the manufacturer for the upcoming new model year.

(e) Beginning September 1, 2002, a manufacturer of new light-duty motor vehicles sold in the state shall submit a copy of the brochure required under subsection (a) or (d) of this section to the executive director, or his designee, by September 1 of each year.

§114.619. Light-Duty Motor Vehicle Purchase or Lease Incentive Schedule.

The incentives provided under §114.612 of this title (relating to Light-Duty Motor Vehicle Purchase or Lease Incentive Requirements) for model years 2003 through 2007 light-duty motor vehicles shall be based on the following emission standards and accompanying incentive amounts:

(1) Bin 4 is eligible for $1,250;

(2) Bin 3 is eligible for $2,225;

(3) Bin 2 is eligible for $3,750; and

(4) Bin 1 is eligible for $5,000.

APPENDIX C - COMPTROLLER STATE SALES AND USE TAX RULES

STATE OF TEXAS
COMPTROLLER OF PUBLIC ACCOUNTS
STATE SALES AND USE TAX

Section 3.320. Texas Emissions Reduction Plan Surcharge; Off-Road, Heavy-Duty Diesel Construction Equipment. (Tax Code, sec. 151.0515)

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Off-road, heavy-duty diesel construction equipment--Diesel powered equipment of 50 horsepower or greater, other than motor vehicles, that is used in the construction of improvements to realty such as roads, buildings, and other permanent structures, or in the repair, restoration, or remodeling of real property. Off-road, heavy-duty diesel construction equipment includes accessories and attachments sold with the equipment. Off-road, heavy-duty diesel construction equipment includes:

(A) backhoes;

(B) bore equipment and drilling rigs;

(C) bulldozers;

(D) compactors (plate compactors, etc.);

(E) cranes;

(F) crushing and processing equipment (rock and gravel crushers, etc., used by contractors to process the construction materials they incorporate into realty);

(G) dumpsters and tenders;

(H) excavators;

(I) forklifts (rough terrain forklifts, etc.);

(J) graders;

(K) light plants (generators) and signal boards;

(L) loaders;

(M) mixers (cement mixers, mortar mixers, etc.);

(N) off-highway vehicles and other moveable specialized equipment (equipment, such as a motorized crane, that does not meet the definition of a motor vehicle because it is designed to perform a specialized function rather than designed to transport property or persons other than the driver);

(O) paving equipment (asphalt pavers, concrete pavers, etc.);

(P) rammers and tampers;

(Q) rollers;

®) saws (concrete saws, industrial saws, etc.);

(S) scrapers;

(T) surfacing equipment;

(U) tractors;

(V) trenchers.

(2) Surcharge--A 1.0% fee is imposed on the sale, lease, or rental in Texas of new or used off-road, heavy-duty diesel construction equipment. This surcharge is in addition to state and local sales taxes that are due on the equipment and is for the benefit of the Texas Emissions Reduction Fund, which is administered by the Texas Natural Resources Conservation Commission.

(3) Total price--The entire amount a purchaser pays a seller for the purchase, lease, or rental of off-road, heavy-duty diesel construction equipment. The total price includes charges for accessories, transportation, installation, services, and other expenses that are connected to the sale.

(b) Collection of surcharge. A seller must collect the surcharge from the purchaser on the total price of each sale, lease, or rental in Texas of off-road, heavy-duty diesel construction equipment that is not exempt from sales tax. The surcharge is collected at the same time and in the same manner as sales tax. See sec. 3.286 of this title (relating to Seller's and Purchaser's Responsibilities) for information on the collection and remittance of sales tax. The surcharge is collected in addition to state and local sales taxes but is not collected on the amount of the sales tax.

(c) Exemptions and exclusions.

(1) No surcharge is due on the sale, lease, or rental of off-road, heavy-duty diesel construction equipment that is exempt from sales tax. A seller who accepts a valid and

properly completed resale or exemption certificate, direct payment exemption certificate, or other acceptable proof of exemption from sales tax is not required to collect the surcharge. For example, a seller may accept an exemption certificate in lieu of collecting sales tax and the surcharge from a farmer who purchases a bulldozer to be used exclusively in the construction or maintenance of roads and water facilities on a farm that produces agricultural products that are sold in the regular course of business.

(2) No surcharge is due on the sale, lease, or rental of off-road, heavy-duty diesel equipment that is not used in construction. A seller may accept an exemption certificate in lieu of collecting the surcharge even if the sale, lease, or rental of the equipment is not exempt from sales tax. For example, a purchaser who buys equipment listed in subsection (a)(1) of this section for a purpose other than use in construction may issue an exemption certificate that states that the equipment will not be used to construct improvements to realty. The seller may accept the exemption certificate in lieu of collecting the surcharge, but is required to collect sales tax if there is no exemption from sales tax. Examples of non-construction activities include mining at quarries, and oil and gas exploration and production at oil and gas well sites.

(3) No surcharge is due on the sale, lease, or rental of off-road, heavy-duty diesel construction equipment that is subject to use tax under Tax Code, Chapter 151, Subchapter D. A purchaser who brings off-road, heavy-duty diesel construction equipment into Texas for storage, use, or consumption in this state, or in other situations in which use tax rather than sales tax is due, is not required to pay or accrue the surcharge.

(d) Reports and payments.

(1) A seller must report and pay the surcharge in the same manner as sales tax, but separate reports and payments for the surcharge are required. A seller's reporting period (i.e., monthly, quarterly, or yearly) and due date for the surcharge is determined by the amount of surcharge that the seller collects. See sec. 3.286 of this title (relating to Seller's and Purchaser's Responsibilities).

(2) A seller must report and pay the surcharge to the comptroller on forms prescribed by the comptroller for the surcharge. A seller is not relieved of the responsibility for filing a surcharge report and paying the surcharge by the due date because the seller fails to receive the correct form from the comptroller.

(3) The penalties and interest imposed for failure to timely file and pay the surcharge are the same as those imposed for failure to timely file and pay sales tax. Likewise, the 0.5% discount for timely filing and payment is applicable to surcharge reports and payments. No prepayment discount will be paid a seller for prepayment of the surcharges.

(e) Effective date.

(1) The surcharge is due on the total price of off-road, heavy-duty diesel construction equipment sold in Texas if the purchaser takes possession of or title to the construction equipment after August 31, 2001 and before October 1, 2008.

(2) The surcharge is due on the total price, excluding separately stated interest charges, of off-road, heavy-duty diesel construction equipment leased under a financing lease, as defined in sec. 3.294 of this title (relating to Rental and Lease of Tangible Personal Property), if the lessee takes possession of the construction equipment after August 31, 2001 and before October 1, 2008.

(3) The surcharge is due on the lease payments for off-road, heavy-duty diesel construction equipment that is leased under an operating lease, as defined in sec. 3.294, if the lessee takes possession of the construction equipment after August 31, 2001 and before October 1, 2008.

Effective Date: March 19, 2002
Filed with Secretary of State: February 27, 2002

CAROLE KEETON RYLANDER
Comptroller of Public Accounts

APPENDIX D - MOTOR VEHICLE SALES AND USE TAX

STATE OF TEXAS
COMPTROLLER OF PUBLIC ACCOUNTS
MOTOR VEHICLE SALES AND USE TAX

Section 3.96. Imposition and Collection of a Surcharge on Certain Diesel Powered Motor Vehicles.

(a) Definitions. The following words and terms, when used in this section, shall have the following meaning, unless the context clearly indicates otherwise.

(1) Motor vehicle subject to surcharge – A motor vehicle that is:

(A) diesel powered;

(B) registered with a gross vehicle weight in excess of 14,000 pounds; and

(C) a 1996 model year or earlier.

(2) Lease – an agreement, other than a rental, whereby an owner of a motor vehicle gives exclusive use of the vehicle to another for consideration for a period that is more than 180 days.

(3) Rental – an agreement whereby:

(A) the owner of a motor vehicle gives exclusive use of the vehicle to another for consideration for a period that is 180 days or less;

(B) the original manufacturer of a motor vehicle gives exclusive use of the motor vehicle to another for consideration; or

(C) the owner of a motor vehicle gives exclusive use of the vehicle to another for re-rental purposes.

(4) Surcharge – A fee of 2.5% of the total consideration paid on a Texas retail sale of a motor vehicle described in paragraph (1) of this subsection. The surcharge is imposed by Tax Code, 152.0215, for the benefit of the Texas Emission Reduction Plan Fund as provided in Health

and Safety Code, 386.251.

(b) Payment, calculation, collection and remittance. Except as provided in subsection (c) of this section, the surcharge is paid, calculated, collected, and remitted in the same manner as the tax imposed on a Texas sale as provided in Tax Code, Chapter 152, and 3.74 of this title (relating to Seller Responsibility).

(c) Motor vehicles purchased for rental or lease.

(1) Rental. A person who purchases in Texas a motor vehicle for rental must pay the surcharge at the time of registration and titling. Payment of the surcharge cannot be deferred even if the purchaser is allowed to defer the motor vehicle sales and use tax. The surcharge is not due on the rental receipts paid to the motor vehicle owner.

(2) Lease. A person who purchases a motor vehicle in Texas for lease must pay the surcharge at the time of registration and titling. The surcharge is not due on the lease receipts paid to the motor vehicle owner.

(d) Exemptions. The exemptions provided in Tax Code, Subchapter E, Chapter152, apply to the surcharge.

(e) Expiration. The surcharge expires September 30, 2008. Texas retail sales after that date are not subject to the surcharge.

Effective Date: January 3, 2002

Filed with Secretary of State: December 14, 2001

CAROLE KEETON RYLANDER

Comptroller of Public Accounts

APPENDIX E - PUC RULES

Rules Adopted by PUC:

§25.182. Energy Efficiency Grant Program.

(a) **Purpose.** The purpose of this section is to provide implementation guidelines for the Energy Efficiency Grant Program mandated under the Health and Safety Code, Title 5, Subtitle C, Chapter 386, Subchapter E, Energy Efficiency Grant Program. Programs offered under the Energy Efficiency Grant Program shall utilize program templates that are consistent with §25.181 of this title (relating to the Energy Efficiency Goal). Programs shall include the retirement of materials and appliances that contribute to energy consumption during periods of peak demand with the goal of reducing energy consumption, peak loads, and associated emissions of air contaminants.

(b) **Eligibility for grants**. Electric utilities, electric cooperatives, and municipally owned utilities are eligible to apply for grants under the Energy Efficiency Grant Program. Multiple eligible entities may jointly apply for a grant under one energy efficiency grant program application. Grantees shall administer programs consistent with §25.181 of this title.

(C) **Definitions.** The following words and terms, when used in this section shall have the following meanings unless the context clearly indicates otherwise:

(1) **Affected counties** — Bastrop, Bexar, Caldwell, Comal, Ellis, Gregg, Guadalupe, Harrison, Hays, Johnson, Kaufman, Nueces, Parker, Rockwall, Rusk, San Patricio, Smith, Travis, Upshur, Victoria, Williamson, and Wilson. An affected county may include a nonattainment area, at which point it will be considered a nonattainment area.

(2) **Demand side management (DSM)** — Activities that affect the magnitude or timing of customer electrical usage, or both.

(3) **Electric utility** — As defined in the Public Utility Regulatory Act (PURA) § 31.002(6).

(4) **Energy efficiency** — Programs that are aimed at reducing the rate at which energy is used by equipment or processes. Reduction in the rate of energy used may be obtained by substituting technically more advanced equipment to produce the same level of end-use services with less electricity; adoption of technologies and processes that reduce heat or other energy losses; or reorganization of processes to make use of waste heat. Efficient use of energy

by consumer-owned end-use devices implies that existing comfort levels, convenience, and productivity are maintained or improved at lower customer cost.

(5) **Energy efficiency service provider —** A person who installs energy efficiency measures or performs other energy efficiency services. An energy efficiency service provider may be a retail electric provider or a customer, if the person has executed a standard offer contract with the grantee.

(6) **Grantee —** the entity receiving energy efficiency grant program funds.

(7) **Nonattainment area —** An area so designated under the federal Clean Air Act §107(d) (42 U.S.C. §7407), as amended. A nonattainment area does not include affected counties.

(8) **Peak demand** — Electrical demand at the time of highest annual demand on the utility's system, measured in 15 minute intervals.

(9) **Peak demand reduction** — Peak demand reduction on the utility system during the utility system's peak period.

(10) **Peak load —** Peak demand.

(11) **Peak period —** Period during which a utility's system experiences its maximum demand. For the purposes of this section, the peak period is May 1 through September 30.

(12) **Retirement —** The disposal or recycling of all equipment and materials in such a manner that they will be permanently removed from the system with minimal environmental impact.

(d) **Commission administration.** The commission shall administer the Energy Efficiency Grant Program, including the review of grant applications, allocation of funds to grantees and monitoring of grantees. The commission shall:

(1) Develop an energy efficiency grant program application form. The grant application form shall include:

(A) Application guidelines;

(B) Information on available funds, including minimum and maximum funding levels available to individual applicants;

(C) Listing of applicable affected counties and counties designated as nonattainment areas; and

(D) Information on the evaluation criteria, including points awarded for each criterion.

(2) Evaluate and approve grant applications, consistent with subsection (e) of this section.

(3) Enter into a contract with the successful applicant.

(4) Reimburse participating grantees from the fund for costs incurred by the grantee in administering the energy efficiency grant program.

(5) Monitor grantee progress on an ongoing basis, including review of grantee reports provided under subsection (g)(8) of this section.

(6) Compile data provided in the annual energy efficiency report, pursuant to §25.183 of this title (relating to Reporting and Evaluation of Energy Efficiency Programs).

(e) **Criteria for making grants.**

(1) Grants shall be awarded on a competitive basis. Applicants will be evaluated on the minimum criteria established in subparagraphs (A)-(F) of this paragraph.

(A) The extent to which the proposal would reduce emissions of air pollutants in a nonattainment area.

(B) The extent to which the proposal would reduce emissions of air pollutants in an affected county.

(C) The amount of energy savings achieved during periods of peak demand.

(D) The extent to which the applicant has achieved verified peak demand reductions and verified energy savings under this or other similar energy efficiency programs and has complied with the requirements of the grant program established under this section.

(E) The extent to which the proposal is credible, internally consistent, and feasible and demonstrates the applicants ability to administer the program.

(F) Any other criteria the commission deems necessary to evaluate grant proposals.

(2) Applicants who receive the most points under the evaluation criteria shall be awarded grants, subject to the following constraints:

(A) The commission reserves the right to set maximum or minimum grant amounts, or both.

(B) The commission reserves the right to negotiate final program details and grant awards with a successful applicant.

(f) **Use of approved program templates.** All programs funded through the energy efficiency grant program shall be program templates developed pursuant to §25.181 of this title.

(1) Program templates adopted under this program shall include the retirement of materials and appliances that contribute to energy consumption during periods of peak demand to ensure the reduction of energy, peak demand, and associated emissions of air contaminants.

(2) Cost effectiveness and avoided cost criteria shall be consistent with §25.181(d) of this title.

(3) Incentive levels shall be consistent with program templates and in accordance with §25.181(g)(2)(F) of this title.

(4) Inspection, measurement and verification requirements shall be consistent with program templates and in accordance with §25.181(k) of this title.

(5) Projects or measures under this program are not eligible for incentive payments or compensation if:

(A) A project would achieve demand reduction by eliminating an existing function, shutting down a facility, or operation, or would result in building vacancies, or the re-location of existing operations to locations outside of the facility or area served by the participating utility.

(B) A measure would be installed even in the absence of the energy efficiency service provider's proposed energy efficiency project. For example, a project to install measures that have wide market penetration would not be eligible.

(C) A project results in negative environmental or health effects, including effects that result from improper disposal of equipment and materials.

(D) The project involves the installation of self-generation or cogeneration equipment, except for renewable demand side management technologies.

(g) **Grantee administration:** The cost of administration may not exceed 10% of the total program budget before January 1, 2003, and may not exceed 5.0% of the total program budget thereafter. The commission reserves the right to lower the allowable cost of administration in the application guidelines.

(1) Administrative costs include costs necessary for grantee conducted inspections and the costs necessary to meet the following requirements:

(A) Conduct informational activities designed to explain the program to energy efficiency service providers and v endors.

(B) Review and select proposals for energy efficiency projects in accordance with the program template guidelines and applicable rules of the standard offer contracts under §25.181(l) of this title, and market transformation contracts under §25.181(j) of this title.

(C) Inspect projects to verify that measures were installed and are capable of performing their intended function, as required in §25.181(k) of this title, before final payment is made. Such inspections shall comply with PURA §39.157 and §25.272 of this title (relating to Code of Conduct for Electric Utilities and Their Affiliates) or, to the extent applicable to a grantee, §25.275 of this title (relating to the Code of Conduct for Municipally Owned Utilities and Electric Cooperatives

Engaged in Competitive Activities).

(D) Review and approve energy efficiency service providers' savings monitoring reports.

(2) A grantee administering a grant under this program shall not be involved in directly providing customers any energy efficiency services, including any technical assistance for the selection of energy efficiency services or technologies, unless a petition for waiver has been granted by the commission pursuant to §25.343 of this title (relating to Competitive Energy Services), to the extent that section is applicable to a grantee.

(3) Only projects installed within the grantee's service area are eligible for compensation under this program.

(4) An electric utility may not count the energy and demand savings achieved under the energy efficiency grant program towards satisfying the requirements of PURA §39.905.

(5) Incentives paid for energy and demand savings under the energy efficiency grant program may not supplement or increase incentives made for the same energy and demand savings under programs pursuant to PURA §39.905.

(6) An electric utility, electric cooperative or municipally owned utility may not count air contaminant emissions reductions achieved under the energy efficiency grant program towards satisfying an obligation to reduce air contaminant emissions under state or federal law or a state or federal regulatory program.

(7) The grantee shall compensate energy efficiency service providers for energy efficiency projects in accordance with the applicable rules of the standard offer contracts under §25.181(l) of this title, and market transformation contracts under §25.181(j) of this title, and the requirements of this section.

(8) The grantee shall provide reports consistent with contract requirements and §25.183 of this title.

APPENDIX F - ESL BUILDERS GUIDE

Texas Residential Building Guide to Energy Code Compliance

International Residential Code (IRC 2000) and International Energy Conservation Code (IECC 2000) as of May 1, 2001

Texas Edition 2001, Revision 1.04

Using This Guide

This guide contains eight color-coded climate zones (numbers 2 through 9) designed to simplify determination of the envelope requirements of the International Residential Code (IRC 2000, Chapter 11) or the International Energy Conservation Code (IECC 2000) for Texas. Refer to the IRC 2000 or IECC 2000, as amended by the 2001 Supplement, for a complete description of all the requirements and compliance alternatives. Local requirements may also vary. Each county is assigned to one of the eight zones, which vary according to the different climate zones in Texas.

Step-by-Step Instructions

A. Use the color-coded map to locate the county in which the construction or remodeling is taking place and find the climate zone (2 through 9) associated with that county.

B. Use the "Table of Building Envelope Requirements" (on the back of this sheet) to find the set of construction options or "paths" associated with the climate zone selected above. Each path describes an acceptable combination of envelope components based on percent glazed area.

C. Review the paths and select the one most suited to your project.

D. Construct or remodel the building according to the selected path and comply with basic code requirements, which include:

- Installing components to Mfr specifications
- Documenting load calculations to insure properly sized HVAC equipment
- Meeting minimum equipment efficiency requirements for HVAC, water heating and other fixtures (Tables 503.2 and 504.2 of IECC)
- Providing preventative maintenance manuals
- Installing temperature controls
- Limiting window and door leakage
- Caulking or sealing joints, gaps and penetrations
- Installing vapor retarders where required
- Sealing and insulating ducts (No duct tape allowed)
- Insulating pipes properly

Texas Counties by Climate Zones

Use the color-coded map of Texas to locate a county. The reverse side of this form shows three prescriptive paths for the selected Climate Zone.

9 — 4,000 - 4,499 HDD

Armstrong	Hansford	Oldham
Bailey	Hartley	Parmer
Carson	Hemphill	Potter
Castro	Hutchinson	Randall
Dallam	Lipscomb	Roberts
Deaf Smith	Moore	Sherman
Gray	Ochiltree	Wheeler

8 — 3,500 - 3,999 HDD

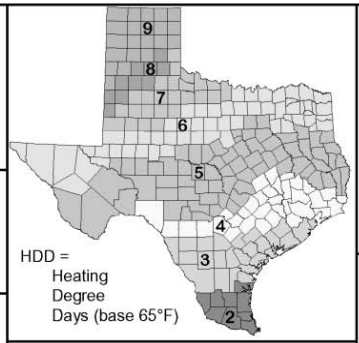
Briscoe	Hall
Cochran	Hockley
Donley	Lamb
Floyd	Swisher
Hale	Yoakum

7 — 3,000 - 3,499 HDD

Archer	Dickens	Lynn
Baylor	Foard	Motley
Borden	Gaines	Scurry
Childress	Garza	Stonewall
Clay	Hardeman	Terry
Collingsworth	Kent	Wichita
Cottle	King	Wibarger
Crosby	Knox	
Dawson	Lubbock	

6 — 2,500 - 2,999 HDD

Andrews	Gregg	Palo Pinto
Bowie	Harrison	Parker
Callahan	Haskell	Rains
Camp	Hopkins	Red River
Cass	Howard	Reeves
Coke	Hudspeth	Rockwall
Collin	Hunt	Shackelford
Cooke	Jack	Stephens
Culberson	Jeff Davis	Sterling
Delta	Jones	Taylor
Denton	Kaufman	Throckmorton
Eastland	Lamar	Titus
Ector	Loving	Upshur
El Paso	Marion	Van Zandt
Erath	Martin	Ward
Fannin	Midland	Winkler
Fisher	Mitchell	Wise
Franklin	Montague	Wood
Glasscock	Morris	Young
Grayson	Nolan	



5 — 2,000 - 2,499 HDD

Anderson	Henderson	Pecos
Angelina	Hill	Polk
Bandera	Hood	Presidio
Bell	Houston	Reagan
Blanco	Irion	Real
Bosque	Jasper	Runnels
Brewster	Johnson	Rusk
Brown	Kendall	Sabine
Burnet	Kerr	San Augustine
Cherokee	Kimble	San Saba
Coleman	Lampasas	Schleicher
Comanche	Leon	Shelby
Concho	Limestone	Smith
Coryell	Llano	Somervell
Crane	Mason	Sutton
Crockett	McCulloch	Tarrant
Dallas	McLennan	Terrell
Edwards	Menard	Tom Green
Ellis	Mills	Travis
Falls	Nacogdoches	Trinity
Freestone	Navarro	Tyler
Gillespie	Newton	Upton
Hamilton	Panola	Williamson
Hays		

4 — 1,500 - 1,999 HDD

Austin	Grimes	Milam
Bastrop	Guadalupe	Montgomery
Bexar	Hardin	Orange
Brazos	Harris	Robertson
Burleson	Jefferson	San Jacinto
Caldwell	Kinney	Uvalde
Chambers	Lavaca	Val Verde
Colorado	Lee	Walker
Comal	Liberty	Waller
Fayette	Madison	Washington
Fort Bend	Medina	Wilson
Gonzales		

3 — 1,000 - 1,499 HDD

Aransas	Galveston	McMullen
Atascosa	Goliad	Nueces
Bee	Jackson	Refugio
Brazoria	Jim Wells	San Patricio
Calhoun	Karnes	Victoria
DeWitt	La Salle	Webb
Dimmit	Live Oak	Wharton
Duval	Matagorda	Zavala
Frio	Maverick	

2 — 500 - 999 HDD

Brooks	Jim Hogg	Starr
Cameron	Kenedy	Willacy
Hidalgo	Kleberg	Zapata

Limitations

Texas recently enacted a statewide energy code. This guide provides a simplified prescriptive specification for individual envelope components to aid with code compliance. This guide does not provide a guarantee for meeting the IRC. For additional details on the IRC or IECC, refer to the code documents, consult local code officials or contact the International Code Council.

Energy Systems Laboratory - Texas A&M University
http://eslsb5.tamu.edu Toll Free: 1-877-AnM-CODE (1-877-266-2633)

Texas Residential Building Envelope Requirements

Simplified Prescriptive Paths for Envelope Compliance with the International Residential Code (IRC 2000)

Table of Building Envelope Requirements

Climate Zone	Path	Glazing and Insulation: Glazing Area%	Glazing U-Factor	Glazing SHGC	Ceiling	Wall	Foundation Type: Basement Floor	Basement Wall	Slab Perimeter	Crawl Space Wall
9	1	15	.45	[1]NR	R-38	R-13	R-19	R-8	R-5, 2ft	R-11
	2	20	.37	[1]NR	R-38	R-13	R-19	R-9	R-6, 2ft	R-13
	3	25	.37	[1]NR	R-38	R-19	R-19	R-9	R-6, 2ft	R-13
8	1	15	.50	[1]NR	R-30	R-13	R-19	R-8	R-5, 2ft	R-10
	2	20	.42	[1]NR	R-38	R-13	R-19	R-8	R-6, 2ft	R-10
	3	25	.41	[1]NR	R-38	R-19	R-19	R-8	R-6, 2ft	R-10
7	1	15	.55	.40	R-30	R-13	R-19	R-7	[2]R-4, 2ft	R-8
	2	20	.46	.40	R-38	R-13	R-19	R-7	R-0	R-8
	3	25	.45	.40	R-38	R-19	R-19	R-7	R-0	R-8
6	1	15	.60	.40	R-30	R-13	R-19	R-6	[2]R-4, 2ft	R-7
	2	20	.50	.40	R-38	R-13	R-19	R-6	R-0	R-7
	3	25	.46	.40	R-38	R-16	R-19	R-6	R-0	R-7
5	1	15	.65	.40	R-30	R-13	R-11	R-5	R-0	R-6
	2	20	.52	.40	R-38	R-13	R-11	R-5	R-0	R-6
	3	25	.50	.40	R-38	R-13	R-19	R-8	R-0	R-10
4	1	15	.75	.40	R-26	R-13	R-11	R-5	R-0	R-5
	2	20	.60	.40	R-30	R-13	R-11	R-5	R-0	R-5
	3	25	.52	.40	R-30	R-13	R-13	R-6	R-0	R-6
3	1	15	.75	.40	R-19	R-11	R-11	R-0	R-0	R-5
	2	20	.70	.40	R-30	R-13	R-11	R-0	R-0	R-5
	3	25	.55	.40	R-30	R-13	R-11	R-0	R-0	R-5
2	1	15	.90	.40	R-19	R-11	R-11	R-0	R-0	R-4
	2	20	.75	.40	R-30	R-13	R-11	R-0	R-0	R-4
	3	25	.65	.40	R-30	R-13	R-11	R-0	R-0	R-4

[1]NR means "No Requirement" specified in IECC Chapter 5 for SHGC in Zone 8 and 9.

[2]The map in IRC Figure R301.2(6) or IECC Figure 502.2(7) indicates that parts of Texas qualify as areas of "very heavy" termite infestation probability. Under an exception in the IRC, the slab perimeter insulation requirement in this path may be avoided. To make use of this exception and still comply with the Code, a builder must use IECC Section 502.2.1.4, IECC Section 502.2.4, or IECC Chapter 4, instead of this path.

Notes:

1. The Table of Building Envelope Requirements is based upon the 2000 International Residential Code (IRC), published by the International Code Council, as amended by the 2001 Supplement.
2. The IRC prescriptive requirements are applicable to single family homes with glazing areas of 15% and below. For homes designed with glazing areas greater than 15%, the IRC incorporates the International Energy Conservation Code (IECC) by reference, which contains additional prescriptive and performance-related compliance alternatives. The glazing areas for each path are maximum levels. For example, a glazing area of 22% must use Path 3, which is the path level for 25% glazing area.
3. Source of requirements: 2000 IRC, Ch. 11 (up to 15% only) and 2000 IECC, Ch. 5, Prescriptive Packages for Climate Zones 2-9, and the 2001 Supplement to IECC. IECC Chapter 4 must be used for glazing areas greater than 25%.
4. U-factor, and SHGC are **maximum** acceptable values.
5. Insulation R-values are **minimum** acceptable levels.
6. Applies to single-family, wood-frame residential construction, only. For mass wall construction, see IRC Section N1102.1.1.1; for steel-framed walls, see IRC Section N1102.1.1.2.
7. "Glazing" refers to any translucent or transparent material in exterior openings of buildings, including windows, skylights, sliding glass doors, the glass areas of opaque doors, and glass block.
8. Fenestration product (window, door, glazing) U-factor and SHGC must be determined from a National Fenestration Rating Council (NFRC) label on the product, or obtained from default tables (IECC Table 102.5.2(3) in Chapter 1).
9. Glazing area % is the ratio of the area of the rough opening of windows to the gross wall area, expressed as a percentage. Up to one percent of the total window area may be exempt from the U-factor requirement.
10. Opaque doors are not considered glazing (or "windows") and must have a U-factor less than 0.35. One exempt door allowed.
11. Infiltration requirements: Windows ≤ 0.30 cfm per sq.ft. of window area; sliding doors ≤ 0.30 cfm per sq.ft. of door area (swinging doors below 0.50 cfm); determined in accordance with AAMA/WDMA 101/I.S.2 (must be tested in accordance with ASTM E 283).
12. R-2 shall be added to the requirements for slab insulation where uninsulated hot water pipes, air distribution ducts or electric heating cables are installed in or under the slab.
13. Floors over outside air must meet ceiling insulation requirements (Table 502.2 in the IECC).
14. R-values for walls represent the sum of cavity insulation plus insulated sheathing, if any.
15. Prescriptive packages are based upon meeting or exceeding minimum equipment efficiencies for HVAC and water heating (IECC Tables 503.2 and 504.2).

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Texas Engineering Experiment Station
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APPENDIX G - ATTORNEY GENERAL OPINION NO. JC-0457

January 28, 2002

The Honorable J.E. "Buster" Brown
Chair, Natural Resources Committee
Texas State Senate
P.O. Box 12068
Austin, Texas 78711-2068

Opinion No. JC-0457

Re: Whether new construction in an area of the state that is outside municipal jurisdiction may delay complying with the Texas Building Energy Performance Standards, chapter 388 of the Health and Safety Code, until September 1, 2002 (RQ-0430-JC)

Dear Senator Brown:

Chapter 388 of the Health and Safety Code, enacted by the Seventy-seventh Legislature, adopts "the energy efficiency chapter of the International Residential Code, as it existed on May 1, 2001, . . . as the energy code in this state for single-family residential construction" and "the International Energy Conservation Code . . . as the energy code for use in this state for all other residential, commercial, and industrial construction." TEX. HEALTH & SAFETY CODE ANN. § 388.003(a), (b) (Vernon Supp. 2002). A municipality is required, by September 1, 2002, to establish procedures for administering and enforcing the codes and "to ensure that code-certified inspectors . . . perform inspections and enforce the code in the inspectors' jurisdictions." *See* Act of May 24, 2001, 77th Leg., R.S., ch. 967, § 11(b), 2001 Tex. Sess. Law Serv. 1970, 1986-87; TEX. HEALTH & SAFETY CODE ANN. § 388.003(c) (Vernon Supp. 2002). A political subdivision encompassing area outside a municipality's jurisdiction is not required to adopt similar procedures and is not subject to the September 1, 2002 deadline. Nevertheless, section 388.004 provides for "[e]nforcement of [e]nergy [s]tandards [o]utside of [m]unicipalit[ies]." TEX. HEALTH & SAFETY CODE ANN. § 388.004 (Vernon Supp. 2002). Section 388.004 took effect on September 1, 2001. *See* Act of May 24, 2001, 77th Leg., R.S., ch. 967, § 22, 2001 Tex. Sess. Law Serv. 1970, 1994. You ask when new construction "in the unincorporated areas of the state," which we understand to be areas outside a municipality's jurisdiction, must "begin complying with the energy performance standards" that chapter 388 of the Health and Safety Code prescribes.[1] We conclude that new construction must have begun complying as of September 1, 2001, which is the effective date of chapter 388 generally.

[1]Letter from Honorable J.E. "Buster" Brown, Chair, Natural Resources Committee, Texas State Senate, to Honorable John Cornyn, Texas Attorney General (Sept. 5, 2001) (on file with Opinion Committee) [hereinafter Request Letter].

The Seventy-seventh Texas Legislature adopted the provisions about which you inquire as part of Senate Bill 5. *See* Act of May 24, 2001, 77th Leg., R.S., ch. 967, § 1(b), secs. 388.001-.008, 2001 Tex. Sess. Law Serv. 1970, 1986-88. As a whole, Senate Bill 5's objective was to bring Texas into compliance with federal limits on maximum allowable concentrations of certain pollutants. *See* SENATE COMM. ON NATURAL RESOURCES, BILL ANALYSIS, Tex. S.B. 5, 77th Leg., R.S. (2001) at 1; *accord* HOUSE COMM. ON ENVIRONMENTAL REGULATION, BILL ANALYSIS, Tex. S.B. 5, 77th Leg., R.S. (2001) at 1; HOUSE RESEARCH ORG., BILL ANALYSIS, Tex. S.B. 5, 77th Leg., R.S. (2001) at 2. To this end, Senate Bill 5 established several programs to facilitate reductions in pollutant emissions, such as an emissions reduction plan, a diesel emissions reduction incentive program, and a technology research and development program. *See* Act of May 24, 2001, 77th Leg., R.S., ch. 967, § 1(b), 2001 Tex. Sess. Law Serv. 1970, 1971-80, 1984-86 (codified at TEX. HEALTH & SAFETY CODE ANN. ch. 386, subchs. B, C, and ch. 387); *see also* SENATE COMM. ON NATURAL RESOURCES, BILL ANALYSIS, Tex. S.B. 5, 77th Leg., R.S. (2001) at 1. The bill also added a new chapter 388 to the Health and Safety Code, entitled "Texas Building Energy Performance Standards." You ask specifically about these Building Energy Performance Standards. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 388.001-.008 (Vernon Supp. 2002); Request Letter, *supra* note 1, at 1.

In enacting chapter 388, in particular, the legislature articulated a need for "an effective building energy code" to reduce "air pollutant emissions," to moderate "future peak electric power demand," to assure the electrical grid's reliability, and to control "energy costs for residents and businesses in this state." TEX. HEALTH & SAFETY CODE ANN. § 388.001(a) (Vernon Supp. 2002). Two sections of chapter 388 are especially relevant to your inquiry. First, section 388.003 adopts building energy efficiency performance standards that apply statewide:

> (a) To achieve energy conservation in single-family residential construction, the energy efficiency chapter of the International Residential Code, as it existed on May 1, 2001, is adopted as the energy code in this state for single-family residential construction.
>
> (b) To achieve energy conservation in all other residential, commercial, and industrial construction, the International Energy Conservation Code as it existed on May 1, 2001, is adopted as the energy code for use in this state for all other residential, commercial, and industrial construction.
>
> (c) A municipality shall establish procedures:
>
> (1) for the administration and enforcement of the codes; and
>
> (2) to ensure that code-certified inspectors shall perform inspections and enforce the code in the inspectors' jurisdictions.

> (d) A municipality or county may establish procedures to adopt local amendments to the International Energy Conservation Code and the energy efficiency chapter of the International Residential Code.
>
> (e) Local amendments may not result in less stringent energy efficiency requirements in nonattainment areas and in affected counties than the energy efficiency chapter of the International Residential Code or International Energy Conservation Code. Local amendments must comply with the National Appliance Energy Conservation Act of 1987 (42 U.S.C. Sections 6291-6309), as amended.
>
> . . . .
>
> (f) Each municipality, and each county that has established procedures under Subsection (d), shall periodically review and consider revisions made by the International Code Council to the International Energy Conservation Code and the energy efficiency chapter of the International Residential Code adopted after May 1, 2001.

Id. § 388.003(a)-(f); *see also id.* § 388.002(1), (6), (7), (10), (11), (12) (defining "affected county," "International Residential Code," "International Energy Conservation Code," "municipality," "nonattainment area," and "single-family residential"). *But cf.* TEX. LOC. GOV'T CODE ANN. § 214.212 (Vernon Supp. 2002) (adopting International Residential Code as municipal residential building code in this state); TEX. REV. CIV. STAT. ANN. art. 6243-101, § 5B(a) (Vernon Supp. 2002) (requiring Board of Plumbing to adopt Uniform Plumbing Code and International Plumbing Code). Second, whereas section 388.003(c) governs enforcement within a municipality's jurisdiction, section 388.004 governs compliance with the energy standards outside a municipality's jurisdiction:

> For construction outside of the local jurisdiction of a municipality:
>
> (1) a building certified by a national, state, or local accredited energy efficiency program shall be considered in compliance;
>
> (2) a building with inspections from private code-certified inspectors using the energy efficiency chapter of the International Residential Code or the International Energy Conservation Code shall be considered in compliance; and
>
> (3) a builder who does not have access to either of the above methods for a building shall certify compliance using a form provided by the [Energy Systems Laboratory at the Texas Engineering

> Experiment Station of The Texas A&M University System], enumerating the code-compliance features of the building.

TEX. HEALTH & SAFETY CODE ANN. § 388.004 (Vernon Supp. 2002); *see also id.* § 388.002(2), (8), (9) (defining "building," "laboratory," and "local jurisdiction").

A municipality that is required to establish procedures under section 388.003(c) must do so no later than September 1, 2002. *See* Act of May 24, 2001, 77th Leg., R.S., ch. 967, § 11(d), 2001 Tex. Sess. Law Serv. 1970, 1992. In other respects, for our purposes here, chapter 388 became effective on September 1, 2001. *See id.* § 22, 2001 Tex. Sess. Law Serv. 1970, 1994.

While Senate Bill 5 requires a municipality that is subject to "the energy code provisions of Chapter 388" to establish administration, enforcement, and inspection procedures by September 1, 2002, you state that "there is no similar effective date mentioned for compliance in the unincorporated areas of the state." Request Letter, *supra* note 1, at 1. You suggest that the omission of a compliance date for areas outside municipal jurisdiction "was an oversight" and that the legislature intended "to have the compliance dates coincide." *Id.*

We conclude that the September 1, 2002 compliance date does not apply to an area outside a municipality's jurisdiction. On its face, section 388.003(c)—the only section with the September 1, 2002 compliance date—applies solely to a municipality. *See* Act of May 24, 2001, 77th Leg., R.S., ch. 967, §§ 1(b), 11(d), 2001 Tex. Sess. Law Serv. 1970, 1987, 1992 (section 1(b) codified at TEX. Health & Safety Code Ann. § 388.003(c) (Vernon Supp. 2002)). Moreover, the legislative history of section 388.003(c) indicates that the legislature purposefully removed areas beyond municipal jurisdiction from section 388.003(c) and, thus, from the September 1, 2002 compliance date. Senate Bill 5, as introduced, did not propose a version of chapter 388 of the Health and Safety Code, concentrating instead on emissions reductions and technology development and research. *See* Tex. S.B. 5, 77th Leg., R.S. (2001) (filed March 7, 2001). The Senate Committee on Natural Resources adopted a committee substitute that proposed chapter 388, but its version of section 388.003(c) permitted, although it did not require, a municipality (and only a municipality) to establish procedures for amending, administering, and enforcing the codes and for inspecting construction:

> A municipality *may* establish procedures:
>
> (1) to adopt local amendments to the International Energy Conservation Code and the energy chapter of the International Residential Code;
>
> (2) for the administration and enforcement of the codes; and
>
> (3) to ensure the code-certified inspectors shall perform inspections and enforce the code in the inspectors' jurisdictions.

Tex. C.S.S.B. 5, § 1(b), sec. 388.003(c), 77th Leg., R.S. (2001) (emphasis added). The Senate committee substitute also proposed section 388.004, "Enforcement of Energy Standards Outside of Municipality," and its proposed version was ultimately adopted, unchanged, in the enrolled bill. *See* Tex. C.S.S.B. 5, § 1(b), sec. 388.004, 77th Leg., R.S. (2001). The House Committee on Environmental Regulation amended the proposed section 388.003(c) to require both a municipality and a county to establish procedures for administering and enforcing the codes:

> A municipality or county shall establish procedures:
>
> (1) for the administration and enforcement of the codes; and
>
> (2) to ensure that code-certified inspectors shall perform inspections and enforce the code in the inspectors' jurisdictions.

Tex. C.S.S.B. 5, § 1(b), sec. 388.003(c), 77th Leg., R.S. (2001) (House Comm. Report). But then, on the House Floor during the bill's second reading, Representative Wolens proposed, and the House adopted, an amendment to the bill that struck from section 388.003(c) the phrase "or county." *See* H.J. OF TEX., 77th Leg., R.S. 3744-45 (2001) (amendment no. 1). Introducing the amendment, Representative Wolens explained that Representative Ramsay requested the amendment on behalf of "the smaller counties":

> Tom Ramsay asked me about this, and on behalf of the small counties, he wanted the counties not to be included in that building code section. So what we are doing is . . . striking the word "county" and not requiring the counties to adopt all of these procedures and giving them no enforcement powers. They're not required to enforce any part of this whatsoever in a county.

Debate on Tex. C.S.S.B. 5 on the Floor of the House, 77th Leg., R.S. (May 21, 2001) (testimony of Representative Wolens) (tape available from House Video/Audio Services Office).

Because chapter 388 as a whole became effective September 1, 2001, new construction in areas beyond municipal jurisdiction must have begun complying with the statewide energy codes as of September 1, 2001, and compliance may not be delayed. *See* Act of May 24, 2001, 77th Leg., R.S., ch. 967, § 22, 2001 Tex. Sess. Law Serv. 1970, 1994. *But see id.* § 11(d), 2001 Tex. Sess. Law Serv. 1970, 1992 (allowing municipality required to establish procedures to have until September 1, 2002). Section 388.004, which provides the only means by which compliance with the energy standards may be monitored in an area beyond municipal jurisdiction, likewise became effective on September 1, 2001. *See id.* § 22, 2001 Tex. Sess. Law Serv. 1970, 1994.

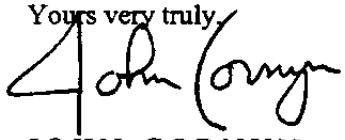
Finally, although section 388.003(c) does not require a county to enforce the new energy codes in an area outside municipal jurisdiction, we conclude that a county voluntarily may enforce them. Subsections (a) and (b) of section 388.003 adopt energy efficiency performance standards "for use in this state," the construction of single-family residences, and "all other residential, commercial,

and industrial construction." TEX. HEALTH & SAFETY CODE ANN. § 388.003(a), (b) (Vernon Supp. 2002). Additionally, a county may adopt local amendments to the statewide standards. *See id.* § 388.003(d), (f). A county that chooses to enforce the standards would do so under section 388.004, which provides for "[e]nforcement of [e]nergy [s]tandards [o]utside of [m]unicipality." *Id.* § 388.004; *see* Tex. Att'y Gen. Op. No. JC-0171 (2000) at 1 (stating that county may exercise only those powers that state constitution and statutes confer upon it).

SUMMARY

Effective September 1, 2001, new construction in an area of the state that is outside a municipality's jurisdiction must have begun complying with the building energy efficiency performance standards adopted under section 388.003 of the Health and Safety Code. *See* TEX. HEALTH & SAFETY CODE ANN. § 388.003 (Vernon Supp. 2002). Compliance may not be delayed until September 1, 2002. Likewise, since September 1, 2001, counties have had authority to monitor and may voluntarily enforce compliance in these areas under section 388.004. *See id.* § 388.004.

Yours very truly,



JOHN CORNYN
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APPENDIX H - ATTORNEY GENERAL OPINION NO. JC-0484

March 27, 2002

The Honorable J.E. "Buster" Brown
Chair, Natural Resources Committee
Texas State Senate
P.O. Box 12068
Austin, Texas 78711-2068

Opinion No. JC-0484

Re: Whether the Texas Council on Environmental Technology may award a grant to one of its members or to a university that employs a member, and related question (RQ-0444-JC)

Dear Senator Brown:

Under the common law, if an officer of a governmental body has an interest in a contract before the body, the governmental body may not enter the contract. *See* Tex. Att'y Gen. Op. No. JC-0437 (2001) at 4. You question whether conflict-of-interest rules preclude the Texas Council on Environmental Technology (the Council) from awarding a grant to a member of the Council, as an individual, or to a university that employs a member.[1] Because we conclude that a grant is subject to the strict common-law rule, we determine that a conflict of interest precludes the Council from making a grant to either a member or to a university that employs the member.

You further ask whether a conflict can "be resolved[] either by the member recusing himself from the vote on the award of that grant[] or by some other means." Request Letter, *supra,* at 2. Because the grant is subject to the strict common-law rule, the conflict may not be resolved by recusal.

The Seventy-seventh Legislature added a new chapter 387 to the Health and Safety Code, which creates the Council to "establish and administer a new technology research and development program." TEX. HEALTH & SAFETY CODE ANN. § 387.003(a) (Vernon Supp. 2002); *see also* Act of May 24, 2001, 77th Leg., R.S., ch. 967, § 1(b), sec. 387.003(a), 2001 Tex. Sess. Law Serv. 1970, 1984. The Council "consists of [eleven] members appointed by the governor to represent the academic and nonprofit communities." TEX. HEALTH & SAFETY CODE ANN. § 387.002(a) (Vernon Supp. 2002). Council members "serve six-year staggered terms." *Id.* The Council must, in particular,

[1]Letter from Honorable J.E. "Buster" Brown, Texas State Senate, to Honorable John Cornyn, Texas Attorney General, at 2 (Oct. 3, 2001) (on file with Opinion Committee) [hereinafter Request Letter].

> work to enhance the entrepreneurial and inventive spirit of Texans to assist in developing solutions to air, water, and waste problems by:
>
> (1) identifying and evaluating new technologies and seeking the approval of the United States Environmental Protection Agency for and facilitating the deployment of those technologies; and—
>
> (2) assisting the commission and the United States Environmental Protection Agency in the process of ensuring credit for new, innovative, and creative technological advancements.

Id. § 387.002(b). The Council also must "establish and administer a new technology research and development program," *id.* § 387.003(a), which will "provide grants to . . . support development of emissions-reducing technologies that may be used for projects eligible for awards under Chapter 386 [Texas Emissions Reduction Plan] and other new technologies that show promise for commercialization," *id.* § 387.003(b); *see also id.* § 387.006 (discussing evidence of commercialization potential). Section 387.004 permits the Council to issue "specific requests for proposals . . . or program opportunity notices . . . for technology projects to be funded under the program." *Id.* § 387.004. Section 387.005 lists eligible grant projects:

> (a) Grants awarded under this chapter shall be directed toward a balanced mix of:
>
> (1) retrofit and add-on technologies to reduce emissions from the existing stock of vehicles targeted by the Texas emissions reduction plan;
>
> (2) advanced technologies for new engines and vehicles that produce very-low or zero emissions of oxides of nitrogen, including stationary and mobile fuel cells;
>
> (3) studies to improve air quality assessment and modeling;
>
> (4) advanced technologies that promote increased building and appliance energy performance; and
>
> (5) advanced technologies that reduce emissions from other significant sources.
>
> (b) The . . . Council shall identify and evaluate and may consider making grants for technology projects that would allow qualifying fuels to be produced from energy resources in this state. In considering projects under this subsection, the [C]ouncil shall give

> preference to projects involving otherwise unusable energy resources in this state and producing qualifying fuels at prices lower than otherwise available and low enough to make the projects to be funded under the program economically attractive to local businesses in the area for which the project is proposed.
>
> (c) In soliciting proposals under Section 387.004 and determining how to allocate grant money available for projects under this chapter, the . . . Council . . . shall give special consideration to advanced technologies and retrofit or add-on projects that provide multiple benefits by reducing emissions or particulates and other air pollutants.
>
> (d) A project that involves publicly or privately owned vehicles or vessels is eligible for funding under this chapter if the project meets all applicable criteria.

Id. § 387.005(a)-(d). The Council "may require cost-sharing for technology projects funded under this chapter but may not require repayment of grant money, except that the [C]ouncil shall require provisions for recapturing grant money for noncompliance with grant requirements. Grant money recaptured under the contract provision shall be . . . reallocated for other projects under this chapter." *Id.* § 387.007.

Section 572.058 of the Government Code, which governs agency conflicts of interest in rule-making and quasi-judicial functions, does not apply to contracts. *See* TEX. GOV'T CODE ANN. § 572.058(a) (Vernon 1994); Tex. Att'y Gen. Op. No. JM-671 (1987) at 6; *accord* Op. Tex. Ethics Comm'n Nos. 412 (1998) at 1 n.1, 298 (1996) at 2 n.2, 220 (1994) at 2 n.3. Under section 572.058, an officer of a state agency like the Council with an interest in a decision before the agency must disclose the interest and recuse him- or herself from participating in the matter:

> An elected or appointed officer, other than an officer subject to impeachment under Article XV, Section 2, of the Texas Constitution [which lists the Governor, Lieutenant Governor, Attorney General, Commissioner of General Land Office, Comptroller, and certain judges], who is a member of a board or commission having policy direction over a state agency and who has a personal or private interest in a measure, proposal, or decision pending before the board or commission shall publicly disclose the fact to the board or commission in a meeting called and held in compliance with Chapter 551. The officer may not vote or otherwise participate in the decision. The disclosure shall be entered in the minutes of the meeting.

TEX. GOV'T CODE ANN. § 572.058(a) (Vernon 1994). This statutory conflict-of-interest provision applies only to "rule making and the application of the statute and rules to individual cases." Tex. Att'y Gen. Op. No. JM-671 (1987) at 5.

In our opinion, a grant from the Council represents a contractual relationship that is not subject to section 572.058, even if a formal contract is not executed. Under article III, section 51 of the Texas Constitution, a state agency may not make a grant unless the body has found that the grant will serve a public purpose and the body has placed sufficient controls on the transaction to ensure that the public purpose is accomplished. *See* TEX. CONST. art. III, § 51 (withholding from Legislature power to make any grant or to authorize making of any grant of public moneys to individual, association, or corporation). This constitutional provision and others like it, *see, e.g., id.* §§ 50, 52(a); *id.* art. VIII, § 3, are intended to prevent a governmental entity from applying public funds to private purposes. *See Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 739-40 (Tex. 1995) (quoting *Byrd v. City of Dallas*, 6 S.W.2d 738, 740 (Tex. 1928)). Nevertheless, the constitution "does not bar a governmental expenditure that benefits a private interest if it is made" to directly accomplish a legitimate public purpose. Tex. Att'y Gen. Op. No. JC-0146 (1999) at 2. Attorneys general long have interpreted section 51 not to forbid a state agency from expending public funds in a way "that benefits a private person or entity if the . . . governing body (i) determines that the expenditure serves a public purpose and (ii) places sufficient controls on the transaction to ensure that the public purpose is carried out." *Id.* A contract that imposes upon a recipient an obligation to perform a function benefitting the public may provide adequate control for constitutional purposes. *See Key v. Comm'rs Court of Marion County*, 727 S.W.2d 667, 669 (Tex. App.–Texarkana 1987, no writ) (per curiam); Tex. Att'y Gen. Op. No. JC-0439 (2001) at 2. Because of the need for controls on the use of the grant, the grants at issue resemble a contractual relationship even though a contract may not be executed. Moreover, the statute itself appears to envision that the grants will be made under a contract: section 387.007 directs the Council to "require provisions for recapturing grant money for noncompliance with grant requirements. Grant money recaptured under the contract provision shall be . . . reallocated for other projects under this chapter." TEX. HEALTH & SAFETY CODE ANN. § 387.007 (Vernon Supp. 2002). Conversely, a grant is not a rule-making or quasi-judicial function of the sort that is subject to section 572.058 of the Government Code. *See* TEX. GOV'T CODE ANN. § 572.058(a) (Vernon 1994); Tex. Att'y Gen. Op. No. JM-671 (1987) at 5.

Rather, a grant from the Council is subject to a strict common-law conflict-of-interest rule that flatly prohibits a governmental body from entering a contract in which one of its members has a personal pecuniary interest. *See* Tex. Att'y Gen. Op. No. JC-0437 (2001) at 4; Tex. Att'y Gen. LO-97-052, at 3 (quoting Tex. Att'y Gen. LO-93-12, at 2). The Texas Court of Appeals enunciated the common-law rule in *Meyers v. Walker*:

> If a public official directly or indirectly has a pecuniary interest in a contract, no matter how honest he may be, and although he may not be influenced by the interest, such a contract so made is violative of the spirit and letter of our law, and is against public policy.

Meyers v. Walker, 276 S.W. 305, 307 (Tex. Civ. App.–Eastland 1925, no writ); *accord* Tex. Att'y Gen. Op. No. JC-0437 (2001) at 4; *cf. City of Edinburg v. Ellis*, 59 S.W.2d 99, 99-100 (Tex. Comm'n App. 1933, holding approved) (applying rule in municipal context); *Int'l Bank of Commerce of Laredo v. Union Nat'l Bank of Laredo*, 653 S.W.2d 539, 547 (Tex. App.–San Antonio 1983, writ ref'd n.r.e.) (same); *Delta Elec. Constr. Co. v. City of San Antonio*, 437 S.W.2d 602, 609 (Tex. Civ. App.–San Antonio 1969, writ ref'd n.r.e.) (same).

Under the strict common-law rule, even a very small pecuniary interest may constitute a prohibited financial interest in a public contract. *See* Tex. Att'y Gen. Op. No. JM-817 (1987) at 2; JM-671 (1987) at 3; JM-424 (1986) at 4; Tex. Att'y Gen. LO-97-052, at 2. Indeed, "[m]ere employment is sufficient to trigger" the common-law conflict-of-interest rule. Tex. Att'y Gen. Op. No. DM-18 (1991) at 2. Moreover, the strict common-law rule reaches a public official's indirect, as well as direct, pecuniary interests. *See Bexar County v. Wentworth*, 378 S.W.2d 126, 128-29 (Tex. Civ. App.–San Antonio 1964, writ ref'd n.r.e.); Tex. Att'y Gen. Op. Nos. JM-817 (1987) at 2; JM-671 (1987) at 3; Tex. Att'y Gen. LO-97-052, at 2. A contract that violates the strict common-law rule is void even if the interested official recused him- or herself. *See* Tex. Att'y Gen. LO-97-052, at 3 (quoting Tex. Att'y Gen. LO-93-12, at 2 and *Delta Elec. Constr. Co. v. City of San Antonio*, 437 S.W.2d 602, 608-09 (Tex. Civ. App.–San Antonio 1969, writ ref'd n.r.e.)).

We consequently conclude that the Council may not award a grant to one of its members. A Council member has a direct pecuniary interest in a grant, and the common-law rule prohibits the grant. Even if the member were to recuse him- or herself, the contract would be void.

We likewise conclude that the Council may not award a grant to a university that employs a Council member. While the strict common-law rule has been applied to preclude contracts between a governmental entity and a private entity in which a public official has an interest, we have found no Texas authorities considering its applicability to a contract between two governmental entities. Nevertheless, it is consistent with the strict common-law rule to extend it to prohibit a contractual grant relationship between two governmental entities where an employee of a grant recipient sits on the governing board of the organization distributing grants. In either context, the rule "guards against competing interests of a public official which would 'prevent him from exercising absolute loyalty and undivided allegiance to the best interest' of the governmental entity he serves." *See* Tex. Att'y Gen. Op. No. H-1309 (1978) at 2 (quoting *Miller v. Martinez*, 82 P.2d 519 (Dist. Ct. App. Cal. 1938)) (extending policy against dual agency to transaction involving governmental entity); *see also* Tex. Att'y Gen. Op. No. JC-0407 (2001) at 6 (same). Certainly, if the Council member is a university employee designated to conduct the research that will be funded, the Council member has a pecuniary interest in the grant. But even if the Council member is not designated to conduct the research, he or she has a direct or indirect pecuniary interest in the grant: for example, one research project may lead other organizations to fund similar research projects at the same university; the grant funds may be used to purchase improved equipment for the research project that may later be used by other university faculty; or the university may enjoy increased prestige for its work in the particular area of research, which may translate into salary increases. *Cf. Pitts v. Larson*, – N. W.2d –, 2001 WL 1658279, *3 (S.D. 2001) (stating that state legislator who

was employed by South Dakota State University Cooperative Extension Service had "indirect interest" in legislature's appropriation to extension service); Tex. Att'y Gen. Op. No. JC-0018 (1999) at 3 (and opinions cited therein) (concluding that housing authority employee who owns home in housing project has interest in project); JM-884 (1988) at 2 (stating that member of Texas Commission for the Deaf has pecuniary interest in contract between Commission and local nonprofit organization that provides services to Commission if member is compensated by local organization).

Finally, under the common-law rule, the interested Council member's recusal will not affect the fact that the contract is void. *See* Tex. Att'y Gen. LO-97-052, at 3 (quoting Tex. Att'y Gen. LO-93-12, at 2 and *Delta Constr. Elec. Co.*, 437 S.W.2d at 608-09).

Of course, the legislature may adopt a statute that overcomes the common-law conflict-of-interest rule in this circumstance. *See* Tex. Att'y Gen. Op. No. JC-0225 (2000) at 3 (stating that legislature may adopt statute that overcomes common-law incompatibility doctrine). The statutes governing the Telecommunications Infrastructure Fund, for instance, explicitly address a situation in which a member of the Telecommunications Infrastructure Fund Board may be employed by an entity applying for a grant or loan from the board:

> If a board member is an employee of an entity that applies for a grant or loan under this subchapter, the board member, before a vote on the grant or loan, shall disclose the fact of the member's employment. The disclosure must be entered into the minutes of the meeting. The board member may not vote on or otherwise participate in the awarding of the grant or loan. If the board member does not comply with this subsection, the entity is not eligible for the grant or loan.

TEX. UTIL. CODE ANN. § 57.047(e) (Vernon Supp. 2002).

Section 51.923 of the Education Code, which concerns the qualifications of a business entity that shares a member or director with a regent of an institution of higher education, does not affect our conclusion. *See* TEX. EDUC. CODE ANN. § 51.923 (Vernon 1996). Subsection (b) states that "[a] nonprofit corporation is not disqualified from entering into a contract or other transaction with an institution of higher education even though one or more members of the governing board of the institution of higher education also serves as a member or director of the nonprofit corporation." *Id.* § 51.923(b). Subsection (d) permits an institution of higher education to enter "a contract or other transaction described in this section if any board member having an interest described in this section in the contract or transaction discloses that interest in a meeting held in compliance with Chapter 551, Government Code, and refrains from voting on the contract or transaction." *Id.* § 51.923(d). For the purposes of section 51.923, a "nonprofit corporation" is "any organization exempt from federal income tax under Section 501 of the Internal Revenue Code of 1986 that does not distribute any part of its income to any member, director, or officer." *Id.* § 51.923(a) [footnote omitted]. A nonprofit corporation is a private entity and is, therefore, distinguishable from a public entity. *See*

Tex. Att'y Gen. Op. No. JM-852 (1988) at 3; Tex. Att'y Gen. LO-95-014, at 3. A state agency is a public entity. *See* Tex. Att'y Gen. LO-95-014, at 3. This office construes section 51.923 according to its clear terms. *See RepublicBank Dallas, N.A. v. Interkal, Inc.*, 691 S.W.2d 605, 607 (Tex. 1985) (directing that statute be construed according to its plain language); *Bouldin v. Bexar County Sheriff's Civil Serv. Comm'n*, 12 S.W.3d 527, 529 (Tex. App.–San Antonio 1999, no pet.) (stating that court may not insert additional words into statute unless it is necessary to effect clear legislative intent). Given that the Council is a state agency, and hence, a public entity, it may not enter a contractual relationship, including a grant of money, with a university under section 51.923 of the Education Code.

S U M M A R Y

A grant made under chapter 387 of the Health and Safety Code is subject to the strict common-law rule prohibiting conflicts of interest. *See* TEX. HEALTH & SAFETY CODE ANN. ch. 387 (Vernon Supp. 2002). Consequently, the Texas Council on Environmental Technology may not award a grant if a member has a direct or indirect pecuniary interest in the grant, including a grant to the member him- or herself or a grant to the university that employs the member. The interested Council member's recusal will not affect the fact that the contract is void.

Yours very truly,

JOHN CORNYN
Attorney General of Texas

HOWARD G. BALDWIN, JR.
First Assistant Attorney General

NANCY FULLER
Deputy Attorney General - General Counsel

SUSAN DENMON GUSKY
Chair, Opinion Committee

Kymberly K. Oltrogge
Assistant Attorney General, Opinion Committee

APPENDIX I - LEGISLATIVE LETTER OF INTENT REGARDING USE OF R-8 FLEXIBLE DUCT

MEMBER:
TEXAS LEGISLATIVE COUNCIL
ENERGY COUNCIL
SOUTHERN STATES ENERGY BOARD
WESTERN STATES WATER COUNCIL
INTERSTATE OIL & GAS COMPACT COMMISSION
GULF STATES MARINE FISHERIES COMMISSION

J.E. "BUSTER" BROWN
STATE SENATOR

SENATE COMMITTEES
CHAIRMAN:
NATURAL RESOURCES
MEMBER:
ADMINISTRATION
JURISPRUDENCE

March 1, 2002

Charles Culp, P.E., Ph.D. & Bahman Yazdani, P.E.
Associate Directors, Energy Systems Lab
Texas Engineering Experiment Station
Texas A&M University
214 Wisenbaker Engineering Res. Ctr.
3581 TAMU
College Station, TX 77843-3581

Re: Legislative intent for use of R8 flexible duct

Dear Dr. Culp & Mr. Yazdani:

Please allow this letter to serve as a written statement of my legislative intent regarding the implementation date for the required use of R8 flexible duct as stated in Senate Bill 5, 77th Legislature. The intended date for use of R8 flexible duct is February 1, 2003.

An exception to use R6 insulated duct in lieu of the R8 duct code requirement should be allowed for until February 1, 2003. This should help clarify confusion when R6 duct is used within the existing code requirements until that date.

The following scientific-based explanations provided by your technical staff at the Texas A&M University Energy Systems Laboratory (TAMU ESL) give further support to the intended date of compliance for all communities within Texas:

> The International Energy Conservation Code (IECC) of 2001 requires that R8 flexible duct be used in place of lower R-rated insulated duct, when ducts are in unconditioned spaces. Although R6 duct is widely and economically available, R8 insulated flexible duct is not at this time. Limited supplies are available from one manufacturer but not in the quantities needed to satisfy the requirements for the homes in municipal areas.

P.O. BOX 12068
AUSTIN, TEXAS 78711-2068
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TDD 1-800-735-2989

P.O. BOX 888
LAKE JACKSON, TEXAS 77566-0888
979/297-5261 • FAX 979/297-7996

12603 SOUTHWEST FREEWAY
SUITE 621
STAFFORD, TEXAS 77477
281/494-7799 • FAX 281/494-7810

1350 NASA ROAD ONE
SUITE 212
HOUSTON, TEXAS 77058
281/333-0117 • FAX 281/335-9101

http://www.senate.state.tx.us

R8 flexible duct

March 1, 2002

Chapter 11 of the International Residents Code (IRC) code specifically allows R5 or higher in homes with up to 15% window to wall area. The IECC requires R8 for above 15% window to wall area. Situations where code inspectors have not allowed R6 duct in housing where the window to wall area is under 15% have been reported, undoubtedly due to confusion and inadequate training.

Technically, R6 insulated flexible duct causes minimal decrease in efficiency except when used in unconditioned attics. Use of R6 duct will result in a few percent loss of efficiency for the cooling system. Improper installation of either R6 or R8 that causes leakage will result in a much greater loss of system efficiency.

As the author of Senate Bill 5, I am also requesting that the TAMU ESL expand the focus of the code training workshops to cover additional detail on the correct installation of this duct, and that the TAMU ESL survey and work with flexible duct manufacturers to prepare to deliver the needed quantities of R8 duct at competitive prices over the next seven months then report to the Senate Natural Resources Committee by September 1, 2002.

Sincerely,

JEB:ww

cc: Texas Association of Builders
Texas Association of General Contractors
Associated General Contractors

APPENDIX J - LEGISLATIVE LETTER OF INTENT REGARDING COMPLIANCE WITH CHAPTER 388, HEALTH AND SAFETY CODE

MEMBER:
TEXAS LEGISLATIVE COUNCIL
ENERGY COUNCIL
SOUTHERN STATES ENERGY BOARD
WESTERN STATES WATER COUNCIL
INTERSTATE OIL & GAS COMPACT COMMISSION
GULF STATES MARINE FISHERIES COMMISSION

J.E. "BUSTER" BROWN
STATE SENATOR

SENATE COMMITTEES
CHAIRMAN:
NATURAL RESOURCES
MEMBER:
ADMINISTRATION
JURISPRUDENCE

April 30, 2002

Douglas Gilliland
President, Texas Association of Builders
510 West 15th Street
Austin, Texas 78701

Re: Compliance with Chapter 388, Health and Safety Code

Dear Mr. Gilliland:

Last session the legislature passed Senate Bill 5 to encourage emission reductions throughout Texas. One portion of Senate Bill 5 established a statewide energy code through the creation of Chapter 388 of the Health & Safety Code. I served as the author of Senate Bill 5. In that capacity and as Chairman of the Senate Natural Resources Committee, I am acutely aware of the deliberations regarding the language of Chapter 388 Senate Bill 5.

Since the end of the 77th Legislative Session, there has been a great deal of confusion regarding the effective date of the energy code provisions of Chapter 388 for the unincorporated areas of the state. During the drafting of Chapter 388 and subsequent discussions, all parties concurred that implementation of the new energy code would require at least one year. Accordingly, September 1, 2002 was selected as the effective date for compliance with Chapter 388 for cities and unincorporated areas.

During floor debate in the House of Representatives, Senate Bill 5 was amended in an attempt to relieve smaller counties of the burden of enforcing the provisions of Chapter 388. However, the amendment inadvertently omitted counties from the September 1, 2002 effective date provision.

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HOUSTON, TEXAS 77058
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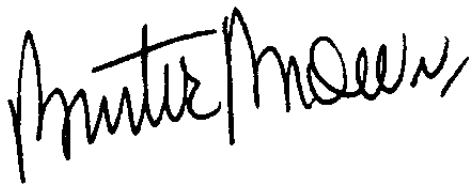
http://www.senate.state.tx.us

On September 5, 2001, I submitted an Attorney General Opinion Request (RQ-0430-JC) asking the Attorney General to examine the matter. On January 28, 2002, Attorney General Cornyn issued opinion No. JC-0457. The Attorney General concluded that Senate Bill 5 established a September 1, 2001 compliance date for unincorporated areas and a separate September 1, 2002 compliance date for municipalities. That was not the intent of Senate Bill 5. The intent of the legislation was to have a uniform compliance date for the municipalities and unincorporated areas.

Sincerely,



cc: Texas Association of General Contractors
Associated General Contractors
TAMU Energy Systems Laboratory
Greater Houston Builders Association

JEB:mkv

APPENDIX K - SENATOR BROWN LETTER TO GOVERNOR AND LEGISLATURE

MEMBER:
TEXAS LEGISLATIVE COUNCIL
ENERGY COUNCIL
SOUTHERN STATES ENERGY BOARD
WESTERN STATES WATER COUNCIL
INTERSTATE OIL & GAS COMPACT COMMISSION
GULF STATES MARINE FISHERIES COMMISSION

J.E. "BUSTER" BROWN
STATE SENATOR

SENATE COMMITTEES
CHAIRMAN:
NATURAL RESOURCES
MEMBER:
ADMINISTRATION
JURISPRUDENCE

June 3, 2002

The Honorable Rick Perry
P.O. Box 12428
Austin, Texas 78711

Dear Governor Perry:

During the 77th Legislature, I authored Senate Bill 5, which created the Texas Emissions Reduction Plan (TERP) to enable the State of Texas to meet the minimum federal standards established under the Clean Air Act. This incentive-based plan was designed to serve as a supplement to the State Implementation Plans (SIPs) proposed for the nonattainment areas in order to receive additional emissions credits from the U.S. Environmental Protection Agency.

In its final form, Senate Bill 5 established funding for the TERP through various statewide fees and surcharges, which are set up as follows:

- **10% surcharge on the registration fees** of a truck-tractor or commercial motor vehicle
- **1% surcharge** on the retail sale, lease, or rental of new or used construction equipment
- **2.5% surcharge** on the retail sale or lease of every on-road diesel motor vehicle that is over 14,000 pounds and is of a model year of 1996 or earlier
- **$10 surcharge** on commercial motor vehicle inspection fee
- **$225 vehicle inspection fee** on vehicles being moved in from out-of-state

These fees were projected to generate an annual budget for the TERP of approximately $130 million. After SB5 was signed into law, several automobile dealers filed a lawsuit contesting the implementation of the $225 out-of-state vehicle inspection fee, and Judge Livingston of Travis County ruled that the fee was unconstitutional. Without this fee, the funding available for the TERP has been drastically reduced to $30 million annually. The SIP proposed for the Houston-Galveston area was approved by the EPA in October, 2001 and took into consideration the emissions reductions that the TERP would produce, as originally funded. The SIP for the Dallas-Fort Worth still awaits approval by the EPA.

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http://www.senate.state.tx.us

I am very concerned the limitations that the reduced funding has placed on the implementation of the TERP will result in the Houston-Galveston SIP losing its approved status from the EPA and that the Dallas-Fort Worth area may not receive approval at all.

However, there is a solution to this problem and the solution begins with the 78th Legislature restoring the full funding for the programs created by the TERP. By fully funding its programs, the TERP will be at the necessary level of effectiveness to generate the emissions reductions that are necessary to meet the requirements set by the EPA. When SB5 left the Senate during the recent legislative session, the engrossed Senate version of the bill included a fee system that was set up as follows:

- **10% surcharge on the registration fees** of a truck-tractor and commercial vehicle statewide
- **0.25% surcharge** on the retail sale, lease, or rental of new or used construction equipment statewide
- **1% surcharge** on the retail sale or lease of every on-road diesel motor vehicle that is over 14,000 pounds statewide
- **$5 fee** for each motor vehicle inspected in a near nonattainment or nonattainment area
- **$1 for each motor vehicle inspected** in all other areas of the state;
- **$1 hotel occupancy** fee imposed on persons staying in hotels in near nonattainment or nonattainment areas
- **$3 for each registration renewal for a motorboat** if operated primarily in a near nonattainment or nonattainment area
- **$1 surcharge for each taxi fare** to or from an airport in a nonattainment or affected county
- **$0.25 per gallon surcharge on bunker fuel** (fuel for ocean-going vessels and boats) sold by petroleum refineries

The Senate version of the TERP funding structure is a potential avenue to restore the original funding established for the TERP. Perhaps we can assure the EPA that the Legislature will restore full funding to SB5 when it convenes again in January, thereby increasing the likelihood that the EPA will give final approval to the North Texas SIP, and maintain approval of the Houston-Galveston SIP.

I appreciate your consideration of this matter and I look forward to working with you in the months ahead.

Sincerely,

JEB:tc

APPENDIX L - GREG COOKE / EPA REGION 6 RESPONSE TO SENATOR BROWN JUNE 3, 2002 LETTER

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

JUL 25 2002

The Honorable J.E. "Buster" Brown
Chairman
Texas Senate Committee on Natural Resources
P.O. Box 12068
Capitol Station
Austin, TX 78711

Dear Senator Brown:

Thank you for your letter dated July 11, 2002, transmitting a copy of the letter you sent to leaders in the State of Texas urging all parties to address Senate Bill 5 (SB 5) funding issues and asking about the impact of lack of funding of SB5. You have confronted "head on" the most significant clean air challenge facing us today and continued to demonstrate your leadership in helping resolve important issues facing Texas communities.

When SB 5, the Texas Emissions Reduction Plan (TERP), was signed into law by Texas Governor Rick Perry on June 15, 2001, the bill established a statewide fund designed to create several economic incentive programs to reduce emissions that would lead to compliance with health based standards under the Federal Clean Air Act. The bill also required the elimination of regulations from the Houston/Galveston and Dallas/Fort Worth area State Implementation Plans (SIPs) for accelerated purchase of Tier II and Tier III engines and a morning construction ban. The deletion of these measures eliminated the reduction of approximately 19 tons per day of nitrogen oxides (NOx) in the Houston/Galveston area and approximately 16 tons per day of NOx in the Dallas/Fort Worth area that was needed to reach attainment.

The passage of SB 5, with projected funding of $133 million annually, offered an historic opportunity to replace the accelerated purchase of Tier II and Tier III engines and the construction ban with several innovative economic incentive programs primarily aimed at diesel engines. The subsequent failure to fully fund SB 5, as a result of a lawsuit that declared the majority of funding unconstitutional, cripples this opportunity.

As you are well aware, before the court's ruling regarding SB5 funding, I approved the Houston/Galveston SIP based in part on incentives for emission reductions contained in SB 5 to address some of the shortfall of NOx. The TERP was also submitted as part of the Dallas/Fort Worth SIP; however, the full funding of SB5 failed before I finalized approval of the Dallas/Fort Worth SIP. Without a fully functional TERP, or other emission reduction measures, both the Dallas/Fort Worth and Houston/Galveston area SIPs will not meet federal air quality standards.

Senator, we share a common goal to create a clean air strategy that brings clean air to the citizens of Texas, not on paper, but in communities across the State. We must provide realistic solutions that provide cleaner air to every Texan. Representatives from both the Texas Natural Resource Conservation Commission and the EPA consulted with your committee concerning the level of funding SB5 needed to obtain our mutual goals. As a result, I believe that I have no choice but to notify the State of Texas that unless SB 5 funding is restored or other equivalent pollution reduction measures are enacted, the Dallas/Fort Worth area SIP will not be approved and the Houston/Galveston SIP's approval will be jeopardized. I have enclosed two Federal Register notices that I have on this day submitted to the Federal Register proposing to take one of two alternative actions regarding the Dallas/Fort Worth area SIP and noticing a failure of implementation of the Houston/Galveston SIP.

These Federal Register notices provide the Texas Legislature with a choice of ways to address air pollution. I look forward to working with the leadership in the State as it examines ways to either restore the original funding established for the TERP during the next Texas Legislative session or to identify other emission reduction strategies that provide comparable emission reductions. I am well aware that this is a difficult task since the construction ban and accelerated purchase provisions were withdrawn by the legislature because of the controversy that was attached to them. However the shortfall is addressed, you have the commitment of EPA Region 6 to work constructively with Texas for clean air.

Thank you for your continued leadership in addressing air quality challenges facing the State of Texas. I look forward to continuing to work with you and the Texas leadership to meet the challenges raised by this serious issue.

Sincerely yours,

Gregg A. Cooke
Regional Administrator

Enclosures

cc: Honorable Rick Perry
Governor of Texas

Honorable Bill Ratliff
Lieutenant Governor of Texas

Honorable James E. "Pete" Laney, Speaker of the House
Texas House of Representatives

Mr. Robert E. Huston, Chairman
Texas Natural Resource Conservation Commission

APPENDIX M - FEDERAL REGISTER NOTICES

DRAFT

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[TX-140-1-7540; FRL- _____]

Proposed Approval, or in the Alternative, Disapproval of State Implementation Plan; Texas; Dallas/Fort Worth Ozone Nonattainment Area.

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to take one of two alternative actions regarding the Dallas/Fort Worth (DFW) State Implementation Plan (SIP). First, the EPA proposes to approve the Texas Emission Reduction Program (TERP) submission if the State provides a funding mechanism that will ensure funding at or above the level contemplated in the State's SIP submission. Second, in the alterative, EPA proposes to disapprove the SIP submission of the TERP because the state does not have adequate funding as required by the Clean Air Act. Because the TERP is necessary to achieve emission reductions relied on in the attainment demonstration for the DFW area, EPA also proposes to disapprove the DFW attainment demonstration SIP if funding at or above the level contemplated in the attainment demonstration is not reinstated or other equivalent emission reduction measures are enacted. If EPA makes final these proposed disapprovals, Texas will have to correct the identified deficiencies within 18 months or the first set of sanctions will begin pursuant to sections 179(a) and (b) of

the Clean Air Act (Act) and conformity will lapse.

DATES: Written comments must be received on or before [Insert date 30 days from date of publication in the Federal Register].

ADDRESSES: Written comments should be addressed to Mr. Thomas H. Diggs, Chief, Air Planning Section (6PD-L), at the EPA Region 6 Office listed below. Copies of documents relevant to this action are available for public inspection during normal business hours at the following locations. Anyone wanting to examine these documents should make an appointment with the appropriate office at least two working days in advance.

Environmental Protection Agency, Region 6, Air Planning Section (6PD-L), 1445 Ross Avenue, Dallas, Texas 75202-2733.

Texas Natural Resource Conservation Commission, Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

FOR FURTHER INFORMATION CONTACT: Herbert R. Sherrow, Jr., Air Planning Section (6PD-L), EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733, telephone (214) 665-7237. e-mail: sherrow.herb@epa.gov.

SUPPLEMENTARY INFORMATION:

Throughout this document "we," "us," and "our" refers to EPA.

What is the background for this action?

The DFW attainment demonstration SIP was submitted on April 25, 2000. On April 30, 2000, the Governor of Texas submitted to

us two SIP rule revisions. The rules established non-road construction equipment operating limitations and accelerated purchase and operation of non-road compression-ignition fleet equipment in the DFW area.

The accelerated purchase rule required those in the DFW ozone nonattainment area who own or operate non-road equipment powered by compression-ignition engines 50 hp and up to meet certain requirements regarding Tier 2 and Tier 3 emission standards. For more information on the Tier 2 and Tier 3 emission standards, see 40 CFR 89.112, "Oxides of nitrogen, carbon monoxide, hydrocarbon, and particulate matter exhaust emission standards."

The rule phased-in Tier 2,3 engines on a schedule earlier than the federal schedule, depending on horsepower. The rule would have the effect of accelerating the turnover rate of compression-ignition engine, non-road equipment. Generally, the rule affected diesel equipment 50 hp and larger used in construction, general industrial, lawn and garden, utility, and material handling applications.

The purpose of the construction ban rule was to establish a restriction on the use of construction equipment (non-road, heavy-duty diesel equipment rated at 50 hp and greater) as an air pollution control strategy until after 10 o'clock a.m. As a result, production of ozone precursors would be stalled until

later in the day when optimum ozone formation conditions no longer existed, ultimately reducing the peak level of ozone. The restrictions were to apply from June 1 through October 31. The rule allowed operators to submit an alternate emissions reduction plan by May 31, 2002. The alternate plan would allow operation during the restricted hours, provided the plan achieved reductions of NOx that would result in ozone benefits equivalent to the underlying regulation.

The DFW attainment demonstration showed that emission reductions of 16 tons per day from these two rules were necessary for the area to reach attainment. Thus, the DFW attainment demonstration relied on these two rules. Please refer to our proposed approval of the rules for more information (66 FR 16432, March 26, 2001).

In May, 2001, the 77th Legislature of the State of Texas passed Senate Bill 5 (SB 5) entitled "The Texas Emission Reduction Program" (TERP). Section 18 of SB 5 required the Texas Natural Resource Conservation Commission to submit a SIP revision to us deleting the requirements of the two rules requiring a ban on construction activities during the morning hours and accelerated purchase of Tier 2,3 diesel engines for the DFW ozone nonattainment area from the SIP no later than October 1, 2001. Repeal of the rules was adopted on August 22, 2001, and submitted to us as a SIP revision on September 7, 2001. The rule repeals

were submitted concurrently with the SIP revision as part of the implementation of SB 5. The rules were contained in Chapter 114 relating to Control of Air Pollution from Motor Vehicles.

The TERP legislation included a grant program designed to accelerate the early introduction and use of lower emitting diesel technologies in the nonattainment and near nonattainment areas of Texas; a grant program to fund improved energy efficiency in public buildings; purchase and lease incentives to encourage the introduction of clean light duty cars into the Texas fleet; and funding for research into new air pollution reducing technologies.

The bill provided funding mechanisms for the program and the State anticipated that about $133 million in new fees would be collected to fund the emission controls contemplated. Unfortunately, the major funding source, a tax on out-of-state vehicle registrations was found to be in violation of the commerce clause of the Fourteenth Amendment of United States Constitution and Article I. §3 of the Texas Constitution. See H.M. Dodd Motor Co. Inc. and Autoplex Automotive, LP. v. Texas Department of Public Safety, et al., Cause No GNID2585(200th Judicial District Court, Travis County, February 21, 2002). Without sufficient funding the State will not be able to achieve all of the emission reductions projected for the TERP in the State Implementation Plan.

What is the effect of the withdrawn rules on the DFW Attainment Demonstration SIP?

These rules supported the DFW Attainment Demonstration SIP. The emission reductions from the rules are necessary for the SIP to show attainment of the National Ambient Air Quality Standard. We cannot take final action to approve the attainment demonstration SIP since one of the measures relied upon for purposes of attainment is not adequately funded.

How does SB 5 replace the withdrawn rules?

SB 5 contains a Diesel Emissions Reduction Incentive Program to achieve emission reductions. Under this program, grant funds are provided to offset the incremental costs of projects that reduce NOx emissions from heavy-duty diesel trucks and construction equipment in nonattainment areas. This program is expected to achieve 16 tons per day of reductions for the DFW area, out of an expected range of 40-50 tons per day. These reductions will be an alternative, but equivalent, mechanism to replace the emission reductions that would have been achieved by the two withdrawn rules.

Why are we proposing approval of the TERP and disapproval as an alternative?

If the State secures funding at or above the level specified in the submitted SIP, we will approve the TERP submittal. If instead, the State submits alternative measures to achieve the

emission reductions attributed to the TERP, we would take further rulemaking on the alternative measures before approving an attainment demonstration that relied on those measures.

Section 110(a)(2)(E) of the Act requires a SIP to have adequate funding to be approvable. A State court determined that a significant portion of the funding mechanism for the TERP violates the Constitution, thus, the State cannot collect a significant portion of the money that was intended to fund the incentives. Thus, the full amount of reductions needed for the DFW area to attain the standard, in accordance with the submitted attainment demonstration SIP, will not be achieved unless, 1) the State develops additional sources of funding for the TERP or, 2) the State adopts replacement measures that achieve equivalent reductions. Thus, in the absence of adequate funding for the TERP or an alternate program, we would need to disapprove the TERP and the associated DFW attainment demonstration.

Why are we proposing disapproval of the Attainment Demonstration SIP?

If the State is unable to fund the TERP consistent with the level in the submitted SIP; or, if alternatively, to adopt and submit substitute measures to achieve any emission reductions that cannot be achieved due to a lack of funding, we will have to disapprove the attainment demonstration SIP. The TERP submission is an underlying portion of the attainment demonstration.

Without implementation of the TERP or of alternative controls to reduce an equivalent amount of emissions, attainment cannot be achieved under the current attainment demonstration SIP.

What are the consequences of disapproval of the TERP submission and disapproval of the attainment demonstration SIP?

If the attainment demonstration SIP is disapproved, then sanctions under section 179 of the Clean Air Act will apply. Under the authority of section 179(a) of the Act and 40 CFR 52.31, if we disapprove a SIP element or a SIP, then the deficiency identified must be corrected within 18 months or sanctions will begin to apply. There are two types of sanctions: Highway Sanctions (section 179(b)(1)) and Offset Sanctions (section 179 (b) (2)).

In accordance with our regulations implementing the sanction provisions of the Act, if the State has not corrected the deficiencies in the TERP program within 18 months of the effective date of the final disapproval, the 2 to 1 offset sanction of section 179(b) will apply in the DFW nonattainment area. The current offset ratio in the DFW area is 1.2 to 1. This sanction requires a company that is constructing a new facility or modifying an existing facility over a certain size to reduce emissions in the area by two tons for every one ton the new/modified facility will emit.

If the State has still not corrected the deficiencies within

six months after the offset sanction is imposed, then the highway sanction will apply in the nonattainment area. This sanction prohibits the U.S. Department of Transportation from approving or funding all but a few specific types of transportation projects.

The order of sanctions; offsets sanctions first, then highway sanctions, is documented in our regulations at 40 CFR 52.31. If sanctions have been imposed, they will be lifted when we determine, after the opportunity for public comment, that the deficiencies have been corrected. The imposition of sanctions may be stayed or deferred based on a proposed determination that the State will correct the implementation deficiencies (40 CFR 52.31(d)(4)).

Also, under the authority of section 93.120 of the Conformity Rule (62 FR 43813, August 15, 1997), if we finalize the disapproval of the attainment demonstration SIP, a conformity freeze will be in place as of the effective date of the disapproval without a protective finding of the budget. This means that no transportation plan, Transportation Improvement Plan (TIP), or project not in the first three years of the currently conforming plan and TIP may be found to conform until another attainment demonstration SIP is submitted and the motor vehicle emissions budget is found adequate. In addition, if the highway funding sanction is implemented, the conformity status of the plan and TIP will lapse on the date of implementation. No

project level approvals or conformity determinations can be made and no new transportation plan or TIP may be found to conform until another attainment demonstration SIP is submitted and the motor vehicle emissions budget is found adequate.

How can Texas correct this deficiency?

The State has an opportunity in the 2003 78th Legislative Session to develop funding mechanisms that would provide sufficient funds for the TERP measures included in the currently approved SIP, which again account for approximately 16 tons per day of emission reductions. Alternatively, the State can revise the State Implementation Plan by either adopting new measures to replace the TERP in its entirety, or by adopting new measures sufficient to account for any loss in emission reductions associated with that portion of the TERP that is unfunded. Finding additional measures for the DFW area will be difficult because of the stringency of the existing plan. Such measures could include implementing fuels measures, or implementing stricter transportation controls, such as "no drive" days.

Administrative Requirements

Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866, entitled "Regulatory Planning and Review."

Executive Order 13045

Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to Executive Order 13045 because it does not mitigate environmental health or safety risks.

Executive Order 13132

Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). Executive Order 13132 requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship

between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely ensures that a state rule properly implements a federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

Executive Order 13175

This rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 6, 2000). Thus, Executive Order 13175 does not apply to this rule.

Executive Order 13211

This rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

Regulatory Flexibility

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

This rule will not have a significant impact on a substantial number of small entities because SIP actions under

section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements but simply act on requirements that the State is already imposing. Therefore, because Federal SIP actions do not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities.

Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. Union Electric Co., v. U.S. EPA, 427 U.S. 246, 255-66 (1976); 42 U.S.C. 7410(a)(2).

Unfunded Mandates

Under sections 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for

informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the action proposed does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action proposes to take action on a State rule submitted to comply with a statutory requirement. It does not establish any federal mandate with which the State must comply.

For the same reasons, EPA has determined that this rule contains no regulatory requirements that might significantly affect small governments.

National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use "voluntary consensus standards" (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical. The EPA believes that VCS are inapplicable to this action. Today's action does not require the public to perform activities conducive to the use of VCS.

List of Subjects in 40 CFR part 52

Environmental Protection, Air Pollution Control, Hydrocarbons, Intergovernmental Relations, Motor Vehicle Pollution, Nitrogen Oxides, Ozone, Reporting and Record Keeping

Authority: 42 U.S.C. 7401 *et seq*.

Dated:

Gregg A. Cooke,

Regional Administrator,

Region 6.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[TX-126-1-7477; FRL-____]

Finding of Failure to Implement a State Implementation Plan; Texas, Houston/Galveston Nonattainment Area; Ozone

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA proposes to find that the approved severe area ozone State Implementation Plan for the Houston/Galveston area is not being implemented according to its terms. If EPA makes final this proposed non-implementation finding, Texas will have to correct the identified deficiencies within 18 months or the first set of sanctions will begin pursuant to sections 179(a)and(b) of the Clean Air Act (Act).

DATES: Written comments must be received on or before [Insert date 30 days from date of publication in the Federal Register].

ADDRESSES: Written comments on this action should be addressed to Mr. Thomas H. Diggs, Chief, Air Planning Section (6PD-L), at the EPA Region 6 Office listed below. Copies of documents relevant to this action, are available for public inspection during normal business hours at the following locations.

Environmental Protection Agency, Region 6, Air Planning Section (6PD-L), 1445 Ross Avenue, Dallas, Texas 75202-2733.

Texas Natural Resource Conservation Commission, Office of Air Quality, 12124 Park Circle, Austin, Texas 78753.

Anyone wanting to examine these documents should make an appointment with the appropriate office at least two working days in advance.

FOR FURTHER INFORMATION CONTACT:

Guy R. Donaldson, Air Planning Section (6PD-L), 1445 Ross Avenue, Dallas, Texas 75202-2733. Telephone Number (214) 665-7242, E-mail Address:Donaldson.Guy@epa.gov.

SUPPLEMENTARY INFORMATION:

Throughout this document "we," "us," and "our" means EPA.

I.Table of Contents

II. Summary

A. What portion of the approved State Implementation Plan are we finding Texas is not fully implementing?

We are proposing to find that Texas is not fully implementing the Texas Emission Reduction Program. Section 110(a)(2)(E) of the Act

requires a SIP to have adequate funding. The TERP program was passed as part of Senate Bill 5 during the 77 th Texas Legislative Session in 2001. This measure was submitted to EPA as part of a SIP revision in a letter from the Governor of Texas dated October 4, 2001. We approved this revision to the SIP on November 14, 2001 (66 FR 57159) through parallel processing. This legislation included, 1) a grant program designed to accelerate the early introduction and use of lower emitting diesel technologies in the nonattainment and near nonattainment areas of Texas, 2) a grant program to fund improved energy efficiency in public buildings, 3) purchase and lease incentives to encourage the introduction of clean light duty cars into the Texas fleet and, 4) funding for research into new air pollution reducing technologies.

The bill provided funding mechanisms for the program and the State anticipated that about $133 million in new fees would be collected to fund the emission controls contemplated. Unfortunately, the major funding source, a tax on out-of-state vehicle registrations was found to be in violation of the commerce clause of the Fourteenth Amendment of United States Constitution and Article I. §3 of the Texas Constitution. See H.M. Dodd Motor Co. Inc. and Autoplex Automotive, LP. v. Texas Department of Public Safety, et al., Cause No GNID2585(200th Judicial District Court, Travis County, February 21, 2002).

Without sufficient funding TNRCC will not be able to achieve all of the emission reductions projected for the TERP in the State Implementation Plan.

B. Why is it important that Texas fully implement this program?

The TERP program is a vital portion of the State Implementation Plan. At the time the Legislature enacted SB 5, it mandated the removal of two control measures the State was relying on in its attainment plan: a ban on construction activities during the morning hours and a requirement that owners and operators of diesel non-road equipment of 50 Horsepower or greater accelerate the purchase of engines meeting Tier 2 and 3 emission standards. For more information on Tier 2 and Tier 3 Standards, see 40 CFR 89.112. The state anticipated that approximately 19 tons per day of the TERP reductions would be needed to compensate for the loss of emission reductions from the two control measures. The EPA estimated that, with the previously anticipated funding level, the TERP program could achieve 27-36 tons per day of emission reductions in the HG area.

It was expected that the remaining reductions in excess of 19 tons per day would contribute significantly to reducing the emission reduction shortfall in the HG SIP. The State has estimated that an additional 56 tons per day of emission reductions need to be adopted in the HG area to meet the National

Ambient Air Quality Standard. The State has committed to adopt, by May 2004, rules to address this shortfall. Texas committed to submit adopted controls to meet 25% of the shortfall by December 2002 and the State anticipated that the remaining TERP reductions could be used to meet all or part of that commitment.

The remaining TERP reductions provide, among other things, incentives for the owners and operators of heavy duty diesel equipment to upgrade their equipment with new engines or with retrofit devices to reduce emissions. Diesel engines have been targeted because of their relatively high NOx emissions and because their long operating life makes the widespread introduction of new cleaner engines into the fleet through normal turnover a lengthy process. With the current level of funding, Texas will not be able to accelerate the introduction of a sufficient number of cleaner diesel engines into the fleet to achieve the emission reductions necessary to demonstrate attainment by November 15, 2007.

C. What are the consequences if we make final this proposed finding of failure to implement?

Under the authority of section 179(a)(4) of the Act, if we make a finding that a provision of an approved plan is not being implemented, then the deficiency identified in the finding must be corrected within 18 months or sanctions will begin to apply.

There are two types of sanctions: Highway Sanctions (section 179 (b) (1)) and Offset Sanctions (section 179 (b)(2)).

In accordance with our regulations implementing the sanction provisions of the Act, if the State has not corrected the deficiencies in the TERP program within 18 months of the effective date of a final finding, the 2 to 1 offset sanction in CAA section 179(b) will apply in the HG area (40 CFR 52.31(d)(1)). This sanction requires a company that is constructing a new or modifying an existing facility over a certain size to reduce emissions in the area by two tons for every one ton of VOC or NOx the new/modified facility will emit. The current offset ratio in the HG area is 1.3 to 1.

If Texas has not corrected the deficiencies within six months after the offset sanction is imposed, then the highway sanction will apply in the HG nonattainment area (40 CFR 52.31(d)(1)). This sanction prohibits the U.S. Department of Transportation from approving or funding all but a few specific types of transportation projects.

The order of sanctions, offset sanctions first then highway sanctions, is set in EPA's regulations at 40 CFR 52.31. If sanctions have been imposed, they will be lifted when we determine, after the opportunity for public comment, that the implementation deficiencies have been corrected. The imposition

of sanctions may be stayed or deferred based on a proposed determination that the State will correct the implementation deficiencies (40 CFR 52.31(d)(4)).

How can Texas correct this deficiency?

The State has an opportunity in the 2003 78th Legislative Session to develop funding mechanisms that would provide sufficient funds for the TERP measure included in the currently approved SIP, which again accounts for approximately 19 tons per day of emission reductions. Alternatively, the State can revise the State Implementation Plan by either adopting new measures to replace the TERP in its entirety, or by adopting new measures sufficient to account for any loss in emission reductions associated with that portion of the TERP that is unfunded. Because the HG SIP already includes stringent controls on virtually every source category, finding additional measures will be very difficult. New measures could include implementing fuels measures, implementing stricter transportation controls, such as "no drive" days, and /or reducing the industrial cap in the HG area.

III. Administrative Requirements

A. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866, entitled "Regulatory Planning and Review."

B. Executive Order 13045

Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to Executive Order 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

C. Executive Order 13132

Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). Executive Order 13132 requires EPA to develop an accountable process to ensure

"meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it does not establish any new requirement

with which the State must comply nor does it alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Rather, consistent with the Clean air Act requirements, this action proposes that the State is not complying with provisions already approved in the SIP. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

D. Executive Order 13175

This proposed rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 6, 2000). Thus, Executive Order 13175 does not apply to this rule.

E. Executive Order 13211

This rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

F. Regulatory Flexibility

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

This rule will not have a significant impact on a substantial number of small entities because SIP findings of failure to implement under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements but simply find failure to implement requirements that already apply under the approved SIP. Therefore, because the Federal SIP finding of failure to implement does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities.

G. Unfunded Mandates

Under sections 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal

governments in the aggregate; or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the finding of failure to implement action proposed does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action proposes to find failure to implement pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

H. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use "voluntary consensus standards" (VCS) if available and applicable

when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical. The EPA believes that VCS are inapplicable to this action. Today's action does not require the public to perform activities conducive to the use of VCS.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Attainment, Hydrocarbons, Nitrogen oxides, Ozone, Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401 *et seq*.

Dated:

Gregg A. Cooke,

Regional Administrator,

Region 6.

APPENDIX N - FINAL JUDGEMENT, AUTO DEALERS LAWSUIT

NO. GN 102585

H.M. DODD MOTOR CO., INC. AUTOPLEX AUTOMOTIVE, L. P., AND ADESA ARK-LA-TEX, L.L.C.	§	IN THE DISTRICT COURT
Plaintiffs,	§	
CARMAX AUTO SUPERSTORES, INC.	§	
Intervenor,	§	
vs.	§	
TEXAS DEPARTMENT OF PUBLIC SAFETY; THOMAS A. DAVIS, JR.; TEXAS DEPARTMENT OF TRANSPORTATION; MICHAEL W. BEHRENS; CAROLE KEETON RYLANDER; AND COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS	§	TRAVIS COUNTY, TEXAS
	§	200TH JUDICIAL DISTRICT
Defendants.	§	

FINAL JUDGMENT

This matter came on to be heard by the Court on the (1) Motion for Summary Judgment filed by Plaintiffs, H.M. Dodd Motor Co., Inc., Autoplex Automotive, L. P., and Adesa Ark-La-Tex, L.L.C. ("Plaintiffs"), (2) the Motion for Summary Judgment filed by Intervenor, CarMax Auto Superstores, Inc. ("Intervenor"), and (3) the Motion for Partial Summary Judgment filed by Defendants, Texas Department of Public Safety, Thomas A. Davis, Jr., Texas Department of Transportation, Michael W. Behrens, Carole Keeton Rylander, and Comptroller of Public Accounts for the State of Texas ("Defendants"). All parties appeared by and through their respective counsel of record and announced ready.

On April 12, 2002, the Court entered its Order on Motions for Summary Judgment, in which

FILED
2002 JUN -6 PM 4:50
DISTRICT CLERK
TRAVIS COUNTY, TEXAS

it rendered the following rulings of law that are now incorporated into this Final Judgment as follows:

1. IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Section 9 of Texas Senate Bill 5, as it amended TEX. TRANSP. CODE §§ 548.256(c) and (d), enacted by the 77th Texas Legislature, is unconstitutional because it violates the Commerce Clause of the United States Constitution.

2. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Section 9 of Texas Senate Bill 5, as it amended TEX. TRANSP. CODE §§ 548.256(c) and (d), is unconstitutional because it violates Intervenor Carmax Superstores, Inc.'s right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution and Article I, § 3 of the Texas Constitution.

3. The Court also found and concluded in its Order on Motions for Summary Judgment that it would be equitable and just to award Plaintiffs and Intervenor reasonable attorneys' fees incurred in this action under TEX. CIV. PRAC. & REM. CODE § 37.009 and directed the parties to confer and attempt to stipulate as to the amount of reasonable attorneys' fees. The parties have appeared before the Court and announced that they have compromised, stipulated and agreed to the amounts set forth below and that said amounts are reasonable. Accordingly,

A. IT IS ORDERED, ADJUDGED, AND DECREED that Plaintiffs, H. M. Dodd Motor Co., Inc., Autoplex Automotive, L.P., and Adesa Ark-La-Tex, L.L.C., have and recover from Defendants Texas Department of Public Safety, Thomas A. Davis, Jr., Texas Department of Transportation, Michael W. Behrens, Carole Keeton Rylander, and the Comptroller of Public Accounts for the State of Texas, jointly and severally, the sum of fifty thousand dollars

($50,000), with interest thereon at the rate of 10 percent per annum from the date of this Final Judgment until paid; and

B. IT IS ORDERED, ADJUDGED, AND DECREED that Intervenor Carmax Auto Superstores, Inc., have and recover from Defendants, Texas Department of Public Safety, Thomas A. Davis, Jr., Texas Department of Transportation, Michael W. Behrens, Carole Keeton Rylander, and the Comptroller of Public Accounts for the State of Texas, jointly and severally, the sum of thirty-seven thousand dollars ($37,000), with interest thereon at the rate of 10 percent per annum from the date of this Final Judgment until paid.

4. The parties have also announced to the Court that both parties have stipulated and agreed not to appeal this judgment, or any part thereof.

5. This is the Court's final judgment in this action. All relief not expressly granted herein is denied.

Signed this JUN - 6 2002 ~~day of May, 2002~~.

/s/ LORA J. LIVINGSTON

Lora J. Livingston, District Judge Presiding

HEREBY APPROVED BY ALL PARTIES AS TO FORM; SO STIPULATED AS TO AMOUNTS OF ATTORNEYS' FEES; AND ALL RIGHTS TO APPEAL WAIVED:

JOHN CORNYN
Attorney General of Texas

HOWARD G. BALDWIN, JR.
First Assistant Attorney General

JEFFREY S. BOYD
Deputy Attorney General for Litigation

TONI HUNTER
Chief, General Litigation Division

JOHN F. MOREHEAD
Texas Bar. No. 14425000
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